1874

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 269.

THE FIRST NATIONAL BANK OF BRUNSWICK, MAINE, APPELLANT,

vs.

THE COUNTY OF YANKTON.

APPEAL FROM THE SUPREME COURT OF DAKOTA TERRITORY.

FILED OCTOBER 11, 1877.

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APPEAL FROM THE SUPREME COURT OF DAKOTA TERRITORY.

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1 UNITED STATES OF AMERICA,
Territory of Dakota, ss:

The people of the Territory of Dakota to the honorable the judge of the district court of the Territory of Dakota for the second judicial district, in and for the county of Yankton, greeting:

Whereas, on the 13th day of June, A. D. 1876, at the April term, 1876, of the district court of Dakota Territory, 2d judicial district, in and for Yankton County, the county of Yankton obtained a decision and recovered a judgment against the First National Bank of Brunswick, Maine, in a certain action pending in said court, brought by said First National Bank of Brunswick, Maine, as plaintiff, against said county of Yankton, as defendant, to recover certain sums of money claimed to be due said plaintiff by said defendant, as it is said in a petition for a writ of error filed in the supreme court of said Territory by said First National Bank of Brunswick, Maine, and because in the record and proceedings, as also in the obtaining of said decision and in the rendition of said judgment, a manifest error hath happened, to the great damage of the said First National Bank of Brunswick, Maine, as by its said petition hath been stated, which said petition hath been considered by the chief jus-
2 tice of said supreme court and the writ of error therein prayed for allowed, therefore you are hereby commanded, that if the decision or judgment aforesaid be therein given, then the record and proceedings aforesaid with all things thereunto relating to the said supreme court of the Territory of Dakota, to be holden at Yankton on the 4th Tuesday of June, 1876, under your seal, distinctly and openly, you send, together with this writ; that the record and proceedings aforesaid being inspected, the said court may further cause to be done therein, for the correcting that error, what of right and according to the laws and customs of this Territory should be done.

Witness the honorable P. C. Shannon, chief justice of the said supreme court, this 14th day of June, A. D. 1876.

[SUPREME COURT OF JUSTICE, DAKOTA TERRITORY.] B. S. WILLIAMS, *Clerk of said Supreme Court.*

WM. POUND AND S. W. PACKARD,
Pl'ff's Att'ys.

(Endorsement:) First National Bank of Baunswick, Maine, vs. The County of Yankton. Writ of error. Recipied and filed June 14, 1876. A. J. Faulk, clerk.

3 The Territory of Dakota to the county of Yankton, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the Territory of Dakota, to be holden at Yankton in said Territory on the fourth Tuesday of June, A. D. 1876, pursuant to a writ of error allowed and filed in the clerk's office of the district court of the Territory of Dakota, 2nd judicial district, in & for Yankton County, wherein the First National Bank of Brunswick, Maine, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why a certain decision obtained and a certain judgment rendered against the said plaintiff in error, and in your favor, on the 13th day of June, A. D. 1876, in said district court, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable P. C. Shannon, chief justice of said supreme court, this fourteenth day of June, A. D. 1876.

P. E. SHANNON,
Chief Justice of said Supreme Court.

WM. POUND AND W. S. PACKARD,
Pl'ff's Att'ys.

Attest.
[SUPREME COURT OF JUSTICE, DAKOTA TERRITORY.]
B. S. WILLIAMS,
Clerk of said Supreme Court.

4 TERRITORY OF DAKOTA,
Yankton County, ss:

Samuel W. Packard, being duly sworn, on oath says that he served the within & foregoing citation upon the county of Yankton, said defendant in error, by delivering to J. R. Gamble, the district attorney for said county and one of the attorneys of record for said defendant in error, a true copy of said citation, and exhibited the original thereof to him this 14th day of June, A. D. 1876.

SAMUEL W. PACKARD.

Subscribed & sworn to before me this 21st day of June, A. D. 1876.
[SEAL OF THE DISTRICT COURT, YANKTON COUNTY, DAKOTA TERRITORY.]
A. J. FAULK,
Clerk of the District Court in & for said Yankton County.

(Endorsement:) Citation. First National Bank of Brunswick, Maine, vs. The County of Yankton.

5 *Petition for writ of error.*

In the supreme court of Dakota.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

To the hon. P. C. Shannon, chief justice of said supreme court:

Your petitioner, the afore-mentioned plaintiff, respectfully represents that a decision was obtained and a judgment rendered against it, and in favor of said above-mentioned deft., wrongfully, on the 13th day of June, 1876, in an action pending in the district court of Dakota Territory, 2nd jud. district, in and for Yankton County, at the April term of said court, said action having been brought in said court by said pl'ff against said deft. for certain sums of money claimed to be due it by said deft., and so the record & proceedings in said action disclose; wherefore this pl'ff prays for a writ of error to be issued according to law to correct said deciston and judgment.

Dated Yankton, June 14th, 1876.

WM. POUND AND
S. W. PACKARD,
Pl'ff's Att'ys.

6 The above petition for a writ of error is allowed, & the clerk of the said supreme court is directed to issue said writ upon the filing of this petition pursuant to the prayer in the above petition.

P. C. SHANNON,
Chief Justice of said Supreme Court.

(Endorsement:) First National Bank of Brunswick, Me., vs. The County of Yankton. Petition for a writ of error.

Filed in my office this 14th day of June, A. D. 1876.
B. S. WILLIAMS, *Clerk.*

WM. POUND & W. S. PACKARD,
Pl'ff's Att'ys.

7 *Judgment roll.*

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

Be it known that we having inspected the files and records of our district court of the territory of Dakota, 2d judicial district in and for Yankton County, do find a certain judgment roll remaining there on file of record in the words and figures following, to wit:

Summons.

In district court, second judicial district.

TERRITORY OF DAKOTA,
County of Yankton.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON. } Summons.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed on the 26th day of February, A. D 1876, in the office of the clerk of the district court in and for the county of Yankton, territory of Dakota, at the court house in the city and county of Yankton, D. T., and serve a copy of your answer on the subscribers at their office on Cedar street in the city of Yankton, Dakota Territory, within thirty days after the service of the summons on you, exclusive of the day of service.

If you fail to answer the complaint within that time, the plaintiff will take judgment for the sum of eight hundred dollars with interest as stated in said complaint.

Dated at Yankton, D. T., this 23d day of February, A. D. 1876.

WM. POUND AND
SHANNON & FAULK,
Plaintiff's Attorneys.

8 COUNTY OF YANKTON, *ss:*

I hereby certify that on the 24th day of February, A. D. 1876, I served the within summons upon the within-named defendant, Yankton County, by delivering to and leaving with J. A. Potter, one of the county commissioners and chairman of the board of county commissioners, and M. P. Ohlman, one of the other county commissioners of the county of Yankton, true copies thereof at the city of Yankton in said county.

M. A. BAKER, *Sheriff*,
By C. P. EDMUNDS, *Deputy*.

Complaint.

District court in and for the second judicial district of Dakota Territory.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

The plaintiff complaining of the defendant alleges:

1. That the plaintiff is a corporation organized under the laws of the United States and of the State of Maine.

2. That wherefore, to wit, on the 1st day of July, A. D. 1872, the said county of Yankton executed its certain railroad aid bonds of that date, numbered 167, 168, 169, 170 and 181, under the authority given by the act of the legislative assembly of the territory of Dakota, entitled "An act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same," approved the 21st day of April, A. D. 1871, and of the act of Congress of the United States entitled "An act in relation to the Dakota Southern Railroad Company," approved the 27th day of May, 1872, and delivered the same to the Dakota Southern Railroad Company, whereby the said county of Yankton promised to pay to the holder of said bonds, on the first day of July, A. D. 1892, for value received, the sum of one thousand dollars on each bond, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the 1st day of January and July of each year in lawful money of the United States, at the Farmers' Loan and Trust Company, in the city of New York, upon presentation and delivery of the proper interest coupons annexed to said bonds.

9 3. The plaintiff further alleges that subsequent to the date of the issuing and delivery of said bonds to said railroad company, and prior to the date of which the interest coupons or any of them hereinafter mentioned became due and payable, said plaintiff purchased said bonds and coupons for a valuable consideration, and ever since said purchase has been and now is the holder and owner of the same.

4. That by the coupons attached to said bonds, viz: the one hundred and sixty-seventh (167), one hundred sixty-eighth (168), one hundred and sixty-ninth (169), one hundred and seventieth (170), and one hundred and eighty-first (181), the sum of forty dollars was due on each bond, as evidenced by the coupons, on the 1st of July, 1874, making $200.00, and the same amount due on each bond, as evidenced by the coupons, on the 1st day of January, 1875, 1st day of July, 1875, and 1st

day of January, 1876, making on each day aforesaid the sum of two hundred dollars, and in all making the sum of eight hundred dollars, due with interest on each two hundred dollars from 1st July, 1874, 1st January, 1875, 1st July, 1875, and 1st January, 1876; but the said defendant has failed and refused to pay the amount due on said coupons or any part thereof, and has ever since utterly failed and refused to pay the same or any part thereof, and the same remains due and payable to said plaintiff, who is the owner and holder thereof.

Wherefore plaintiff demands judgment against defendant for the sum of eight hundred dollars with interest thereon as above stated, besides costs of this action.

WM. POUND AND
SHANNON,
Plaintiff's Attorneys.

FEB. 23D, 1876.

10 *Amended complaint.*

District court in and for the second judicial district of Dakota Territory.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.
} Amended complaint.

The plaintiff complaining of the defendant alleges:

1. That the plaintiff is a corporation duly authorized and organized under the laws of the United States, and of the laws of the State of Maine, with power to sue and be sued in its corporate name of the First National Bank of Brunswick, Maine.

2. That heretofore, to wit, on the 1st day of July, A. D. 1872, the said county of Yankton executed its certain railroad aid bonds of that date, numbered one hundred and sixty-seven (167), one hundred and sixty-eight (168), one hundred and sixty-nine (169), one hundred and seventy (170), one hundred and eighty-one (181), one hundred and eleven (111), one hundred and twelve (112), one hundred and sixteen (116), one hundred and eighteen (118), and one hundred and nineteen (119), under the authority given by the act of the legislative assembly of the territory of Dakota, entitled "An act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same," approved the 21st day of April, A. D. 1871, and of the act of Congress of the United States, entitled "An act in relation to the Dakota Southern Railroad Company," approved the 27th day of May, 1872, and elivered the same to the Dakota Southern Railroad Company, whereby the said county of Yankton promised to pay to the holders of said bonds on the 1st day of July, A. D. 1892, for value received, the sum of one thousand dollars on each bond, with interest at the rate of eight per cent. per annum, payable semi-annually on the 1st day of January and July of each year in lawful money of the United States at the Farmers' Loan and Trust Company, in the city of New York, upon presentation and delivery of the proper interest coupons annexed to said bonds.

3. The plaintiff further alleges that subsequent to the date of the ssuing and delivery of said bonds to said railroad company and prior

to the date at which the interest coupons or any of them hereinafter mentioned became due and payable, said plaintiff purchased said bonds and coupons for a valuable consideration, and ever since said
11 purchase has been and now is the holder and owner of the same, and duly presented them for payment.

4. That by the coupons attached to said bonds, viz, Nos. 167, 168, 169, 170, 181, 111, 112, 116, 118, and 119, aforesaid, the sum of forty dollars was due on each bond as evidenced by the coupons, as follows: On Nos. 167, 168, 169, 170, and 181 on the 1st July, 1874, and 1st January, 1875; and also on the said last Nos. and on Nos. 111, 112, 116, 118, and 119, on the 1st July, 1875, and 1st January, 1876, and making in all the sum of twelve hundred dollars, with interest on each coupon from the respective days aforesaid on which they became due and payable, but the said defendant has failed and refused to pay the amount due on said coupons or any part thereof, although the defendant has collected large amounts of the railroad tax for that purpose, and has retained the same or applied it to other purposes, and has ever since utterly failed and refused to pay the said coupons or any part thereof to the plaintiff, and the same remains due and payable to said plaintiff, as aforesaid.

Wherefore plaintiff demands judgment against defendant for the sum of twelve hundred dollars, with interest thereon as above stated, besides the costs of this action.

WM. POUND AND
SHANNON & FAULK,
Plaintiff's Attorneys.

MARCH 18, 1876.

Answer.

In district court, 2d judicial district.

TERRITORY OF DAKOTA,
County of Yankton, ss:

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine, plaintiff,
vs.
THE COUNTY OF YANKTON, DEFENDANT.

1. The defendant, for answer to the plaintiff's complaint herein, denies each and every allegation thereof, except as hereinafter expressly admitted.

2. Said defendant admits that said plaintiff is a corporation, organized and with power and authority as alleged in said complaint.

3. Said defendant, further answering said complaint, alleges that on or about the 17th day of March, 1871, at said county of Yankton, certain persons, citizens of said Territory and of the city of Chicago, claiming to possess authority therefor by virtue of the general incorporation act of said Territory, passed and approved January 6th, 1868, undertook to organize and incorporate a railroad company to con-
12 struct a railroad leading from the city of Yankton, on the Missouri River, eastward through the counties of Yankton, Clay and Union, to a point on the Big Sioux River between township No. eighty-eight (88) and No. ninety-three (93) north, inclusive, and having the western terminus of its road at said city of Yankton, and not elsewhere, and named it the Dakota Southern Railroad Company. That on

and before the said 21st day of April, 1871, pursuant to a call by the acting governor of said Territory, the persons who had been and were members of legislative assembly of said Territory, assembled at the capital of said Territory, and undertook to pass said enactment, entitled "An act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same," and which purported to be approved the said 21st of April, 1871, and which is attached hereto and made part hereof.

That by the provisions of said act, if valid, the qualified voters of said county were authorized to hold an election and vote to extend the aid of said county to any railroad company, either by donation, loan of credit or subscription to the capital stock of said company upon the terms and conditions, and subject to the restrictions therein mentioned. That in pursuance of said pretended enactment, a petition was presented to the then board of county commissioners of said Yankton County, praying such board to submit to the qualified voters of said county a proposition to extend the aid of said county to said Dakota Southern Railroad Company, so as aforesaid organized, and having its western terminus at the said city of Yankton, by donating $200,000 to said company in the bonds of said county, running for twenty years and bearing eight per cent. interest per annum, payable semi-annually.

That upon the presentation of said petition, said board of commissioners called said election, and on the 2d day of September, 1871, such election was had, and the votes that were then cast in favor of said aid were all in accordance with such proposition to extend aid by a donation or gift to said company so having its western terminus at said city of Yankton, and its eastern terminus at the Big Sioux River, and no votes were cast in favor of a subscription to the capital stock of said company or any railroad company, or to aid any other road than the one having its western terminus at said city of Yankton.

Said defendant further says that afterwards, and on or before the 1st day of July, A. D. 1872, without there having been held any other election of the qualified voters of said Yankton County, whereas a proposition to extend aid to said Dakota Southern Railroad Company had been voted upon, pretending to possess the authority thereof, by
13 virtue of said act of Congress, which for convenience is set forth as an exhibit hereto, the then board of county commissioners of said Yankton County subscribed to the capital stock of the Dakota Southern Railroad Company as organized and described in the said act of Congress, having its western terminus at the west line of Bon Homme County, about forty miles west of said city of Yankton, and its eastern terminus at Sioux City, Iowa, to the amount of $200,000 of such capital stock, issued the bonds of said county in payment therefor, a part of which are the bonds mentioned and described in said plaintiff's complaint, and said railroad company negotiated and sold said bonds for much less than ninety cents on the dollar, to wit, not exceeding 69 cents on the dollar, all of which plaintiff well knew.

Said defendant further alleges that in violation of the said act of Congress, and with the intent and for the purpose of evading its provisions, requiring certificates of paid up stock to be issued to said county to the amount of its subscription and vote of aid, said railroad company, at and before the said subscription and issue of said bonds, put upon said road a mortgage of all its property and franchise to the amount of $1,200,000, said amount being fifty per cent. more than the entire cost thereof, and delivered the same to Wicker, Meckling & Co., who were then and there and still are the only other stockholders in said corpo-

ration, and who still hold the same, and that the stock of said county so subscribed for was rendered wholly valueless, of all of which the plaintiff had due notice.

Said defendant alleges and charges that at the time of the issue of said bonds by the then board of county commissioners there was no law authorizing the same. That the said legislative assembly of said Territory had been in session during the months of December, 1870, and January 1871, full forty days, the limit of time allowed by law, had adjourned without day, and the members thereof had no authority to again assemble and pass any legislation on the 21st of April, 1871.

That said election of the 2d of September, 1871, and all proceedings prior thereto and subsequent, under said pretended enactment, were wholly nugatory and void, and that the bonds mentioned and described in said plaintiff's complaint, and the coupons for interest sued upon, are wholly void and of no force or effect.

Wherefore the defendant demands to go hence with its costs.

J. R. GAMBLE,
Dist. Att'y.
G. C. MOODY,
S. L. SPINK,
Att'ys for Defendant.

14 EXHIBIT A.

An act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same.

Be it enacted by the legislative assembly of the Territory of Dakota:

SECTION 1. Whenever one hundred of the qualified voters, or a number equal to one third of the voters as indicated by the last general election, of any county or township in this Territory shall petition in writing the board of county commissioners of such county, or the county commissioners of any county, in which township or townships may lie, to submit to the qualified voters of such county or townships a proposition to extend aid, either by donation, loan of credit or subscription to capital stock of said railroad company in the name of such county or township, to any railroad proposed to be constructed into or through such county or township, and shall in such petition designate the railroad company and the amount and kind of aid proposed to be given or extended, and the mode and terms of the payment of the same, together with the conditions of such aid, it shall be the duty of the county commissioners to cause an election to be held of the qualified voters of such county or townships to determine whether such aid shall be given or extended.

SEC. 2. The board of county commissioners shall make an order for the holding of an election contemplated in the preceding section, and specify the amount of bonds proposed to be issued, either as a donation or in payment of subscription to capital stock to the railroad company, the mode and terms of payment, the interest, if any, the extent of time said bonds shall run, the name of the railroad company, and all conditions pertaining to such proposed aid as may be named in such petition, the day of election, and shall also prescribe the form of the ballots to be used at such election for and against such aid: Provided, that in case such bonds are taken in exchange for capital stock in such railroads such bonds shall be taken at par, nor shall any such bonds be negotiated at less than ninety cents on the dollar, either by said town-

ships or counties, or by the said railroad companies: Provided further, that such bonds shall not be issued by the county commissioners or delivered to the railroad companies until such railroad is completed and in running order through said county or township voting aid, as aforesaid, or such assurances given that said road will be so completed as the county or township voting bonds shall require: Provided, the bonds shall not be given to any railroad company or individual except in payment for the grading, tieing, building, or other necessary work for such railroad, and then such an amount of bonds may be given as will cover the cost of the work performed.

SEC. 3. If the time of holding the next general election after the date of making the order in the last section provided shall not be more than sixty days, the said election provided for in the two preceding sections shall be held on the day of said next general election, and notice thereof shall be given and the election held, and returns thereof made, and the result ascertained and proclaimed as provided by law for general elections.

SEC. 4. If the next general election is more than sixty days from the reception of such petition, then the board of county commissioners shall order a special election to be held within forty days, and make an order for the same, specifying in the order as in the preceding sections, and also specifying how notice shall be given, which shall be by publication in some newspaper, if there be one published in the county or township, and also by copy of the order posted up in three public places in each election precinct in the county or township twenty days before said election. In all other respects the said election shall be held, returns thereof made, and the result ascertained and proclaimed as provided by law for general elections. And it shall be the duty of the clerk of the board of county commissioners, upon the reception of such petition to call a special meeting of said board within five days.

SEC. 5. If a majority of the electors voting at such election vote for the issue of bonds, the board of county commissioners shall cause such bonds as may be required by the terms of said vote to be issued and delivered in accordance with section second of this act, in the name of such county or township, to be signed by the chairman of the board of county commissioners and attested by the register of deeds, under the seal of the county.

SEC. 6. Whenever any bonds shall be issued in pursuance of the foregoing provisions, it shall be the duty of the board of county commissioners annually to proceed to levy and collect a tax on all the taxable property in the county or townships voting such tax, sufficient to pay the interest on said bonds: Provided, That more than two per cent. of the assessed valuation of the property in any county or township shall be raised in any one year under the provisions of this law either for the payment of interest or bonds.

SEC. 7. Said bonds shall not be made payable in less than ten years, neither shall they run more than twenty years, and after the expiration of five years from the date of issue a sinking fund shall be provided, which will redeem the said bonds at maturity.

SEC. 8. Such tax as provided in the foregoing sections shall be collected in cash or the coupons of such bonds, which may be due, and such tax shall be collected as county taxes are collected, and paid out by the treasurer on presentation of the coupons or bonds, when due, and all county officers acting under the provisions of this act shall be entitled to the same fees as are allowed by law for similar services and liable to the same fines and penalties for non-compliance.

B fore the treasurer or any officer now, or who may be hereafter, authorized by this act shall proceed to collect the taxes levied under this act, or any portion thereof, (he) shall give a bond to the county commissioners in double the amount to be collected, for the faithful discharge of his duties; and any officer loaning, using, or failing to pay over any portion of the money collected under the provisions of this act, shall be guilty of a misdemeanor, and on conviction thereof shall be imprisoned in the penitentiary for not less than three nor more than ten years.

SEC. 9. If any county or township tax shall be assessed and collected from any railroad which may have been built in whole or in part in any town or county which may have subscribed stock, as provided in the foregoing sections, all such county or township tax arising from said railroad within said county or township shall be set apart and held by the treasurer for the benefit of such county or township, and applied to the payment of the interest and principal of said bonds.

SEC. 10. Whenever any sum of the foregoing taxes collected for interest or sinking fund shall remain in the hands of the treasurer, after paying all the interest due, if any, the board of county commissioners shall cause the treasurer to buy up the bonds at their market value, not exceeding par.

SEC. 11. This act shall take effect and be in force from and after its passage and approval by the governor.

Approved April 21, 1871.

EXHIBIT B.

An act in relation to the Dakota Southern Railroad Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act passed by the legislative assembly of the Territory of Dakota, and approved by the governor on the twenty-first day of April, eighteen hundred and seventy-one, entitled "An act to enable organized counties and
17 townships to vote aid to any railroad, and to provide for the payment of the same," be, and the same is hereby, disapproved and annulled, except in so far as is herein otherwise provided. But the passage of this act shall not invalidate or impair the organization of the company heretofore organized for the construction of the Dakota Southern Railroad, leading from Sioux City, Iowa, by way of Yankton, the capital of said Territory, to the west line of Bon Homme County, or any vote that has been or may be given by the counties of Union, Clay, Yankton, and Bon Homme, or any township granting aid to said railroad, or any subscription thereto, or anything authorized by and that may have been done in pursuance of the provisions of the aforesaid act of the legislative assembly of said Territory towards the construction and completion of said railroad, and the said Dakota Southern Railroad Company, as organized under and in conformity to the acts of the legislative assembly of said Territory, is hereby recognized and declared to be a legal and valid corporation; and the provisions of the act of the legislative assembly first aforesaid, so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company for the construction, completion, and equipment of the main stem of said railroad, between the termini aforesaid, are hereby declared to be and remain in full force, but no further, and for no other purpose whatsoever.

SEC. 2. That for the purpose of enabling the said Dakota Southern

Railroad Company to construct its said road through the public lands between the termini aforesaid, the right of way through said public lands is hereby granted to said company to the extent of one hundred feet in width on each side of said road: Provided, That nothing in this act shall relieve said Dakota Southern Railroad Company from constructing and completing said railroad in accordance with the conditions and stipulations under which the citizens of the counties therein named voted aid to said railroad in accordance with the laws of said Territory, approved April 21st, eighteen hundred and seventy-one: Provided further, That said Dakota Southern Railroad Company shall issue to the respective counties and townships voting aid to said railroad, paid-up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships.

Approved May 27, 1872.

18 *Bill of exceptions.*

TERRITORY OF DAKOTA,
County of Yankton:

In district court, second judicial district, in and for said county.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

Be it remembered that at the April term, 1876, of this court, the above cause having been tried by the court, without a jury (a jury having been duly waived in open court and entered upon the minutes of the court), the presiding judge of said court, the honorable P. C. Shannon, made and filed on the 13th day of June, 1876, the following findings of fact and conclusions of law, viz:

Findings of fact and law.

TERRITORY OF DAKOTA,
County of Yankton, ss:

In district court, 2d judicial district.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

This cause having been tried before me at the present April term, 1876, of this court, without a jury (a jury having been waived by the consent of both parties, made in open court), I do make and file the following findings of fact and conclusions of law:

Findings of fact.

1. That on the 18th day of April, 1871, there assembled at the city of Yankton, the then capitol of said Territory, pursuant to a request therefor made and issued by the then acting governor of said Territory, the

persons who were then members of the territorial council and house of representatives of said Territory, and who had been elected as such in the fall of 1870, and after being so assembled, and after organizing as a territorial council and house of representatives, said persons undertook to, and did proceed to legislate for said Territory of Dakota, and in so doing, undertook to, and did on the 21st day April, 1871, pass an act entitled "An act to enable organized counties and townships to vote aid to any railroad and to provide for the payment of the same," which was approved by the then governor of said Territory, on the said 21st day of April, 1871, which said act is as follows:

(See said act, Exhibit A of answer, page 8.)

19 That the said territorial enactment of April 21st, 1871, was not published thereafter in any published copy of legislative enactments.

2. That the said members of such legislative assembly had previously convened in regular session on the 5th day of December, 1870, and had been and remained in session from that date until the 13th day of Jan., 1871 (with the exception of the intervening Sundays, upon which days said assembly did not convene), when such session was adjourned without day. The said last day being called in the journals of such legislative assembly as the 40th day of said session, although said legislative assembly had only been in actual session, transacting business, on 35 days.

3. That on the 17th of March, 1871, certain persons, citizens of Dakota Territory, under and by virtue of the general incorporation act of said Territory, passed and approved January 6th, 1868, organized a railroad company, named the Dakota Southern Railroad Company, for the construction and completion of a railroad from the city of Yankton, on the Missouri River, eastward though the counties of Yankton, Clay, and Union, to a point on the Big Sioux River, between townships 88 and 93, both inclusive, and having its western terminus at said city of Yankton, in the county of Yankton, the capital of said Territory, which said articles of incorporation were filed in the office of the secretary of the Territory of Dakota, March 20, 1871, and were copied into the record book in said secretary's office, on the 15th day of March, 1872. Said articles of incorporation are in the words and figures following, viz:

ARTICLES OF INCORPORATION.

This certificate of incorporation certifies that the following articles of agreement made and concluded this 17th day of March, A. D. eighteen hundred and seventy-one, in the city of Yankton, capital of Dakota Territory, by and between James M. Stone, J. Shaw Gregory, Wilmot W. Brookings, A. W. Burrows, E. D. Barker, S. V. Clevenger, A. P. Hammon, C. F. Harkins, E. P. Wilcox, Geo. W. Kingsbury, Jas. S. Foster, C. E. Bramble, A. J. Faulk, J. B. S. Todd, Newton Edmunds, D. T. Bramble, C. H. McIntyre, J. R. Sanborn, Chas. Eiseman, G. C. Moody, F. J. Dewitt, W. N. Collamer, B. R. McIntyre, Joel A. Potter, G. H. Whetmore, S. S. Buckwalter, and M. U. Hoyt, witnesseth:

That whereas it is the intention of the above-named parties to hereby and herein organize themselves into a legally incorporated railroad company under and by virtue of the provisions of the genera lincorporation act of Dakota Territory, approved January 6th, A. D. 1868, entitled "An act to regulate the corporations under the name and style

20 of the 'Dakota Southern Railroad Company,' for the purpose of constructing and operating a line of railroad from the city of Yankton, on the Missouri River, eastward through the counties of Yankton, Clay, and Union, to a point on the Big Sioux River, between townships Nos. eighty-eight (88) and ninety-three (93), both inclusive."

This corporation which is hereby and herein formed and established, for the purpose of constructing the above line of road shall be named and known as the "Dakota Southern Railroad Company," and the said line of road proposed to be built shall be designated as the "Dakota Southern Railroad," and the amount of capital stock necessary to construct and equip said road is hereby declared to be one million five hundred thousand dollars, ($1,500,000), which shall be divided into shares of one hundred dollars each, which shares of stock shall be subscribed for as provided in section eighty (80) of the aforementioned incorporation law of the Territory; work to be completed in three years.

In accordance with the requirements of section eighty-seven (87) of the incorporate act aforesaid, the incorporators herein named do hereby "establish a place of business on the line of said road" which shall be located in the city of Yankton, at J. R. Hanson's land office, corner of Capital and Third streets, and the same is hereby declared to be the temporary office of the "Dakota Southern Railroad," until changed by the board of directors, and at said office of the company, the first books for subscription of stock to the Dakota Southern Railroad shall be opened to the public on the twenty-fifth (25th) day of April, A. D. 1871.

J. M. STONE. [SEAL.]
WILMOT W. BROOKINGS. [SEAL.]
C. E. BRAMBLE. [SEAL.]
E. D. BARKER. [SEAL.]
GEO. W. KINGSBURY. [SEAL.]
M. U. HOYT. [SEAL.]
D. T. BRAMBLE. [SEAL.]
J. B. S. TODD. [SEAL.]
J. SHAW GREGORY. [SEAL.]
C. C. MOODY. [SEAL.]
J. A. POTTER. [SEAL.]
J. R. SANBORN. [SEAL.]
NEWTON EDMUNDS. [SEAL.]
A. W. BURROWS. [SEAL.]
S. V. CLEVENGER. [SEAL.]
CHAS. F. HARKINS. [SEAL.]
E. P. WILCOX. [SEAL.]
A. P. HAMMOND. [SEAL.]
JAMES S. FOSTER. [SEAL.]
G. H. WETMORE. [SEAL.]
21 C. H. McINTYRE. [SEAL.]
F. J. DEWITT. [SEAL.]
B. R. McINTYRE. [SEAL.]
WM. N. COLLAMER. [SEAL.]
A. J. FAULK. [SEAL.]
CHARLES S. EISEMAN. [SEAL.]
S. S. BUCKWALTER. [SEAL.]

TERRITORY OF DAKOTA,
County of Yankton, *ss*:

On this 18th day of March, A. D. 1871, before me, a notary public in and for said county, personally came the persons named in the foregoing articles of the corporation as incorporators, personally known to me to

be the persons whose names are affixed to the foregoing instrument, and acknowledged the same to be their voluntary act and deed for the purpose therein expressed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Yankton, on the date last above written.

[SEAL.] C. J. B. HARRIS,
Notary Public.

TERRITORY OF DAKOTA,
Yankton County, ss:

I, George I. Foster, clerk of the district court of Yankton County, do certify that C. J. B. Harris, esq., whose name is subscribed to this certificate of proof or acknowledgment of the annexed instrument and thereunto written, was at the time of taking such proof or acknowledgment a notary public in and for said county, duly authorized to take the same; that I am well acquainted with the handwriting of said notary, and verily believe that the signature to the said certificate or acknowledgment is genuine; and that the said instrument is executed and acknowledged according to the laws of said Territory.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this 20th day of March, A. D. 1871.

GEO. I. FOSTER, *Clerk.*

4. That in pursuance of said alleged enactment, a petition signed by over 100 qualified voters of Yankton County was presented to the then board of county commissioners of said Yankton County, praying said board to submit to the qualified voters of said county a proposition to extend the aid of said county to said Dakota Southern Railroad Company, which said petition was as follows, viz:

22 To the honorable the board of county commissioners of Yankton County, Dakota Territory:

We the undersigned, qualified voters of Yankton County, Dakota Territory, respectfully petition your honorable board that you submit to the qualified voters of said county of Yankton a proposition to extend aid by donating two hundred thousand dollars ($200,000) in county bonds of said county to the Dakota Southern Railroad Company, said bonds to run twenty years, with coupons attached and bearing interest at the rate of eight per cent. per annum, said interest to be paid semi-annually in the city of New York, and said principal to be paid at the expiration of said time, in the said city of New York, providing that said bonds shall not be given or donated to said company, except in payment for the grading, tieing, building, or other necessary work on the said railroad proposed to be built by said company, and that said bonds shall only be given or donated in payment for work actually performed on said road, and shall in no case be delivered faster than said work progresses.

Geo. W. Kingsbury, W. W. Brookings, J. M. Stone, H. J. Brisbine, O. Wertare, Thos. Royster, A. K. Marvin, Thomas Boyster, Chas. B. Wing, J. Arp, J. J. Bauman, E. C. Dudley, U. W. Robertson, Geo. Pike, jr; Geo. H. Bell, N. J. Cattell, P. T. Rodgers, Henry Herd, Meyer Zeigler, L. Biermeyer, C. J. B. Harris, William Tripp, John Otteson, C. F. Rossteuscher, O. H. Carney, C. C. Brookings, M. Schoeming, G. A. Batchelder, John Spring, Thos. Fishbeck, T. J. McLeese, Frank Bem, John S. Horst, H. C. Burr, Wm. Miner, G. H. Wetmore, C. E. Bramble, M. H. Ruch, W. E. Babcock, W. Fawcett, Henry H. Nichols, A. C. Brownson, D. E. Brownson, J. Riddell, J. G. Edgar, L. H. Litchfield,

John Lawrence, G. H. Galbraith, H. C. Ash, P. Cavalier, H. McCumber, D. T. Bramble, E. P. Wilcox, O. Osborn, J. T. Lovett, Silas Burton, Wm. Bordeno, C. G. Holquist, Geo. H. Miner, J. D. Flick, Geo. D. Mathieson, R. A. Ketchum, T. J. Alseth, P. Cunningham, Even Segard, James Conner, S. L. Spink, G. Johnson, E. Herrick, Ole Olson, John F. Lenger, Frank V. Pterka, H. H. Smith, Mark M. Parmer, P. C. Waldron, J. W. Albright, jr.; B. M. Semple, H. E. Cook, Arthur Linn, Samuel H. Morrow, John McGuire, L. Congleton, W. T. Carther, N. Leonard, M. Grady, Ole Halverson, S. S. Buckwalter, J. L. Kelly, L. M. Purdy, A. F. Wood, Nelson Learned, A. McLean, T. A. Kingsbury, Emery Guild, J. B. S. Todd, W. M. Boomer, W. Learned, I. Ingwerson, J. L. Dunlap, H. B. Wynn, Stephen Flick, T. W. Brisbine, Z. Richey, R. Dawson, D. E. Hinman, A. J. Sweetser, L. M. Griffith, J. A. Corey, J. Gray, Wm. Leeper, F. M. Ziebach, Adler & Ohlman, C. Van Epps, Walter H. Carr, S. P. Rees, W. P. Lyman, H. H. Nichols, M. M.
23 Matthiesen, M. Hoyt, Wm. Bause, J. W. Wheelock, John J. Duffack, John Killillay, Samuel Vance, James Rogers, Wm. Carens, Frank Partaka, George Herrick, Bartlett Tripp, P. K. Faulk, Benj. Hayes, Richard M. Loeber.

5. That thereupon said board of county commissioners, at a special meeting called in pursuance of the following notice:

COUNTY CLERK'S OFFICE,
Yankton County, D. T., August 5th, A. D. 1871.

Notice is hereby given that a special meeting of the board of county commissioners of Yankton County, Dakota Territory, will be holden at the office of the register of deeds of said county, on Monday, the 7th day of August, A. D. 1871, at 10 o'clock a. m., for the purpose of considering a petition signed by over one hundred of the qualified voters of said county of Yankton, asking said board of county commissioners to submit to the qualified voters of said county a proposition to extend aid by donating two hundred thousand dollars ($200,000), in county bonds of said county of Yankton, to the Dakota Southern Railroad Company, under conditions specified in said petition, and for the further purpose of submitting the proposition contained in such petition to the qualified voters of said county of Yankton in accordance with an act entitled "An act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same," which was approved by the governor on the 27th day of April, A. D. 1871.

[COUNTY SEAL.] ERICK IVERSON,
Register of Deeds and ex officio County Clerk, Yankton County, D. T.

Adopted the following resolutions:

Resolved, That whereas a petition has been filed with the county clerk of Yankton County, signed by over one hundred of the qualified voters of said county, asking that aid be donated to the Dakota Southern Railroad Company in bonds of Yankton County, the following being a copy of said petition, to wit (see petition); and whereas, in accordance with said petition, the county clerk of said Yankton County did post notices, calling a special meeting of the board of county commissioners to meet at his office on the seventh day of August, 1871, to consider the prayer of said petition, a copy of which notice is hereto attached as follows, to wit (see notice); and whereas more than sixty days intervene between the date of filing said petition and the next general election:

Now, therefore, be it resolved by the said board of county commissioners of Yankton County, that a special election be and is hereby ordered to be held in said Yankton County on Saturday, the second
24 day of September, A. D. 1871, at which the question of donating aid to the said Dakota Southern Railroad Company to the amount of two hundred thousand dollars in the bonds of said Yankton County, to run twenty years, bearing interest at the rate of eight per cent. per annum, said interest to be paid semi-annually in the city of New York, and the said principal also payable in the city of New York. Said bonds shall not be given or donated to said railroad company, except in payment for the grading, tieing, building, or other necessary work on said railroad to be built by the said company, and that said bonds shall only be given or donated in payment for work actually performed on said railroad, and shall in no case be delivered faster than work on said road progresses; and provided that said bonds shall not be issued by the county commissioners or delivered to said railroad company until said railroad is completed and in running order to and within the present limits of the city of Yankton, or, such assurance (security) given that said railroad will be so completed as said Yankton County shall require.

Resolved, That the ballots at such special election shall have written or printed thereon, "Aid to Dakota Southern Railroad Company, yes;" "Aid to Dakota Southern Railroad Company, no."

Resolved, That the voting places in the said county of Yankton shall be the same designated as the places for holding the general election in October, and that the judges of election appointed for the general election shall act as the judges at the special election herein ordered.

Resolved, That notice of the special election above ordered shall be published in the Union & Dakotaian, and the Yankton Press; and that three notices of such election shall be posted in each election precinct.

CHARLES EISEMAN,
Chairman.

Approved.
[COUNTY SEAL.] E. IVERSON, *Clerk.*

6. That afterwards, and on the 2d day of September, 1871, in accordance with the terms and provisions of said alleged enactment of April 21st, 1871, a majority of the voters of said Yankton County, as appears by the record of the proper canvassing officers, voting on that day, to wit: 543 for and 126 against, voted to extend the aid of Yankton County to the said Dakota Southern Railroad Company, by a donation of the amount of two hundred thousand dollars, in the bonds of said county, payable in twenty years, with coupons attached, bearing interest at 8 per cent. per annum, payable semi-annually, in the city of New York, and said principal to be paid at the expiration of said time, in
25 said city of New York; provided that the said bonds shall not be given or donated to said company, except in payment for the grading, tieing, building or other necessary work on said railroad proposed to be built by said company, and that said bonds should only be given or donated in payment for work actually performed on said road, and should in no case be delivered faster than said work progressed; and provided further, that said bonds should not be delivered until the road should be completed and in running order to and within the limits of the city of Yankton, in said Yankton County, or such assurances of completion given as the said county might require.

7. That on the 8th day of November, 1871, at a meeting of the board

of county commissioners of Yankton County, the following preamble and resolutions were adopted by said board, viz:

Whereas at an election held at the several precincts in the county of Yankton, on Saturday, the 2d day of September, A. D. 1871, in pursuance of an act of the legislative assembly of the Territory of Dakota, approved April 27, 1871, the board of commissioners of said county were authorized to extend to the Dakota Southern Railroad Company the aid of said county in the construction of said railroad, by issuing and delivering to the said company the bonds of said county to the amount of ($200,000) two hundred thousand dollars, upon certain conditions and provisions contained in the submission of the question of such aid to a vote at said election, and in the act aforesaid, therefore be it—

Resolved, That the county of Yankton will aid the Dakota Southern Railroad Company in the construction and completion of its road, and the same is hereby tendered to the amount of ($200,000) two hundred thousand dollars, in the bonds of said county for that amount, to be issued in sums of ($1,000) one thousand dollars each, which bonds shall be payable twenty years from the (1st) first day of July, A. D. 1872, with interest at the rate of eight per cent. per annum, payable semi-annually, according to the tenor and effect of coupons to be attached to said bonds. The first semi-annual interest payable on the 1st day of January, A. D. 1873, and the coupons receivable for taxes as provided by law, and such bonds and interest to be payable at such place in the city of New York as may hereafter be designated by the board of county commissioners of said county, such bonds to be issued and delivered only upon the happening of the following events:

That no portion of said bonds shall be issued or delivered to said company, or to any person or corporation for them, until said company shall have entered into a bond with said county of Yankton, in the penal sum of ($400,000) four hundred thousand dollars, with sufficient and
26 responsible sureties, conditioned in effect that the said railroad shall be completed from the terminus or some station of some railroad leading into the city of Chicago, Illinois, to and within the limits of the city of Yankton, as such limits existed on the 5th day of August, 1871, by virtue of the charter of said city, and in running order, constructed as well as the average western roads, and trains of cars actually run thereon, and with its track connected with some road running to Chicago, of the same guage, so as to give direct railroad communication between said city of Yankton and Chicago, without necessitating the transfer of freight at any such point of connection, and with further conditions that said road shall be so completed on or before the first day of January, A. D. 1873, and in case of failure to comply with all the conditions of the bond within the time aforesaid, making the time for such completion an essential part of the agreement; said bond shall contain a provision liquidating the damages to be recovered by said county upon it at the amount of the face of the bonds actually issued, with all interest that shall have accrued thereon, up to the recovery of the judgment upon such bond, and ($10,000) ten thousand dollars additional to cover the expenses of engraving or lithographing and issuing such bonds and all other expenses the county shall have been put to by reason of such extension of aid, and the sureties upon such bond to justify before some officer duly authorized to administer oaths, and to be approved by the board of county commissioners, and such bond to be prepared under direction of said board of county commissioners; or in case the said company shall prefer rather than to give such bond to

await the completion of said road, that then the bonds shall issue and be delivered only when said road is so completed as aforesaid, and in running order, and trains so actually running thereon, to and within the said limits of said city of Yankton, as such limits actually existed by virtue of the charter of said city on the 5th day of August, A. D. 1871, with guage and connection as above provided, and so completed on or before the said 1st day of January, A. D. 1873. In no event shall any portion of said bonds be issued or delivered to said company or any person or corporation for them, except in payment for the grading, tieing, building, or other necessary work on said railroad, and then only in payment for work actually performed on said road, and shall in no case be delivered faster than the said work progresses. And in order to ascertain and determine the amount of work done on said railroad, said company shall give to said board of commissioners ten (10) days' notice before the bonds to cover said work shall be demanded, by filing a certified estimate of the work so done, certified by the chief engineer of
27 said road, with the clerk of said county. Whereupon, the said board of commissioners shall, by their chairman and at least one other member of the board, together with a competent engineer, to be by said board selected proceed to inspect such work, and if the amount of work reported is found to have been actually performed in good faith, the said board shall issue and deliver to said company or to any person they may direct for them sufficient bonds to cover such work, until the whole amount authorized shall issue.

Be it further resolved, that a copy of the foregoing preamble and resolutions, duly certified under the hand of the clerk and the seal of the county, be furnished to the president of said Dakota Southern Railroad Company, with a request that they be laid before the board of directors of said company, and said company asked to notify the board of county commissioners, by its duly authorized agent, whether the proposed aid is accepted upon the terms and conditions aforesaid.

CHARLES EISEMAN,
Chairman.

Approved.
[COUNTY SEAL.] ERICK IVERSON, *Clerk.*

8. That said preamble and resolutions were presented to the Dakota Southern Railroad Company, as provided in said resolutions, and were laid before the board of directors of said railroad company.

9. That afterwards, and on the 2d day of January, 1872, at a meeting of the board of county commissioners of Yankton County, the said board received from the board of directors of the Dakota Southern Railroad Company the following resolution and placed the same on file, viz:

At a regular meeting of the board of directors of the Dakota Southern Railroad Company, held at the office of said company in the city of Yankton, on Monday, the 1st day of January, A. D. 1872, among other the following were had:

On motion of Director W. A. Burleigh, it was resolved, That the proposition for the extension of the aid of Yankton County to the Dakota Southern Railroad Company in the construction of the road, as communicated to this company by resolution of the board of commissioners of said county, of date November 8th, 1871, be and the same is hereby accepted with the provisions and conditions therein contained, saving and excepting that condition which requires the completion of the road in any event by the first day of January, A. D. 1873, and the said railroad company desires a modification to this effect, that in case of such

a general overflow of the Missouri River bottoms the coming spring as to necessitate a suspension of the work upon such bottom lands, that in that event the railroad company shall have until the first day of July, 1873, to so complete said road, and request an acceptance of such modifications.

28 Resolved, That this company will execute to said county the bond in such resolution specified with such modifications, as soon as the same can be perfected, and now request that the said board of commissioners shall, at an early day, take steps to provide for the preparation, engraving and issue of such bonds.

Be it further resolved, That a copy of these resolutions, certified under the hand of its secretary and the seal of this company, be furnished to the said board of commissioners by the secretary.

W. W. BROOKINGS,
President.

Attest:
J. R. HANSON,
Secretary.

I, J. R. Hanson, secretary of the Dakota Southern Railroad Company, do certify that the above and foregoing is a full, true and correct copy of the resolutions of the board of directors of said company, as appears from the minutes of proceedings of January 1st and 2nd, 1872.

In witness whereof I have hereunto set my hand as such secretary, and the seal of the said company, this 2nd day of January, A. D. 1872.

[SEAL DAKOTA SOUTHERN RAILROAD.] J. R. HANSON,
Secretary.

And thereupon said board of county commissioners at said session, on the 2d day of January, 1872, adopted the following resolutions, viz:

Resolved, That whereas, this board having received from the Dakota Southern Railroad Company a resolution accepting the proposition of donation of aid from the county of Yankton, as extended through resolution of this board of date November 8th, 1871, with the condition therein contained, saving and excepting said company request a modification of the condition of time provided in said resolution, and it seeming to this board a reasonable request; therefore be it

Resolved, That the request of said company for such modification with the time for the completion of said road be and the same is hereby accepted to as in their resolution specified, and therefore if such general overflow of the Missouri River bottoms shall occur in the season of 1872, as to occasion a suspension of such work by said railroad company, that then and in that event the time for the completion of said road shall be extended until July 1st, 1873, and the bond to be required shall contain such modification.

Resolved, That the clerk of this board be instructed to communicate to said company these resolutions.

29 Among other, Commissioner G. B. Hoffman introduced the *the* following resolution:

Resolved, That there be appropriated by the county of Yankton, out of the county fund in the treasury, the sum of eleven hundred dollars, to be paid to Messrs. Wicker, Meckling & Co., for the engraving and in preparing the two hundred thousand dollars ($200,000) bonds, voted to the Dakota Southern Railroad Company, said amount not to be paid

until the bond heretofore provided for from the Dakota Southern Railroad Company, to be given and approved by the board.

CHAS. EISEMAN,
Chairman.

Approved.
[YANKTON CO. SEAL.] E. IVERSON, *Clerk.*

10. That said resolutions of the board of commissioners of Yankton County accepting the modification asked, were communicated at once to the said R. R. company, as provided to be done in said resolution. And the sum of $1,100 was actually paid out by Yankton County to Wicker, Meckling & Co., in county warrants, afterwards redeemed by the county, for preparing and engraving the said $200,000 of bonds, as provided in the resolution of January 2d, 1872.

11. That on the 28th day of May, 1872 (one day after the approval of the act of Congress "in relation to the Dakota Southern Railroad Company"), at a meeting of the board of commissioners of Yankton County, W. W. Brookings, on behalf of the Dakota Southern Railroad Company, came before the board with a proposition on the part of the said railroad company to said board of county commissioners for said board, to issue to said railroad company $100,000 of the aid voted by Yankton County to said railroad company for the construction of said road, the said company having filed a statement of work performed on the line of the road. But on motion, the said board refrained from taking action until legal advice be taken as to the mode of issuing the bonds and also for the further security of the said county.

12. At a meeting of the board of county commissioners of said county held June 9th, 1872, a bond given by the said railroad company, to Yankton County, as security for the performance of the conditions and obligations imposed upon said county by the resolutions of the said board of county commissioners, adopted Nov. 8th, 1871, and Jan. 2d, 1872, was discussed. Said bond being in the words and figures following, viz:

Know all men by these presents, that the Dakota Southern Railroad Company, principal, and Wicker, Meckling & Co., W. W. Brookings, W. A. Burleigh, J. R. Hanson, J. M. Stone, and J. H. Wicker,
30 sureties, are held and firmly unto the county of Yankton, in the penal sum of four hundred thousand dollars, for the payment of which we bind ourselves, our successors, our and each of our heirs, executors and administrators, firmly by these presents, signed by the duly authorized officers and sealed with the seal of said corporation, and signed by the hands and sealed with the seals of said sureties, this 23d day of April, A. D. 1872, at the city of Yankton, in said county.

The condition of the above obligation is such, that whereas the said county of Yankton has extended aid to said railroad company, by voting bonds of said county to said company, to the amount of two hundred thousand dollars, and whereas said company now desires to obtain so much of said bonds from time to time as will equal the expenditures made by said company, in and about the construction of said road: Now, therefore, if the said company shall construct and complete said railroad from the terminus or station of some railroad leading into the city of Chicago, Illinois, to and within the limits of the city of Yankton, as such limits existed on the 5th day of August, 1871, by virtue of the charter of said city, and place such road in running order, constructed as well as the average of western roads, and trains of cars actually run thereon, and its track connected with some road so leading

to Chicago of the same gauge, so as to give direct railroad communication between said city of Yankton and Chicago, without necessitating the transfer of freight at any such point of connection, and if such road shall be so completed on or before the first day of January, A. D. 1873, saving and excepting, however, that if there shall be such a general overflow of the Missouri River bottoms this spring or season, as to necessitate a cessation of the labor upon said road, then in that case, if said railroad shall be so constructed and completed by the first day of July, A. D. 1873, then this obligation to be void, else of full force and effect. It is further understood by and between the obligors in this bond and said county, that the time herein agreed for the completion of said railroad, shall form an essential part hereof, and that if there shall be a failure on the part of the said company to fulfill the conditions of this obligation, in whole or in part, the damages to be recovered thereon shall be and they are hereby liquidated at the amount of the face of the bonds, actually issued by said county to said company or their assigns, with all the interest that shall have accrued thereon up to the recovery of the judgment upon the bond, and ten thousand dollars (10,000) additional to cover the expenses of engraving, lithographing and issuing such bonds, and all other expenses the county shall have been put to by reason of such extension of aid, which conditions are in accordance with the resolution of the board of county commissioners of said
31 county, as passed November 8th, 1871, as modified by a resolution passed January 2d, 1872, and accepted by said railroad company.

THE DAKOTA SOUTHERN RAILROAD COMPANY,
By W. W. BROOKINGS,
President.

WICKER, MECKLING & CO. [SEAL.]
W. A. BURLEIGH. [SEAL.]
J. M. STONE. [SEAL.]
W. W. BROOKINGS. [SEAL.]
J. R. HANSON. [SEAL.]
J. H. WICKER. [SEAL.]

STATE OF IOWA,
County of Woodbury, ss:

I, J. H. Wicker, being duly sworn, on oath say that I am a member of the firm of Wicker, Meckling & Co., of the city of Chicago, Ills., and that said firm is worth over and above all incumbrances and liabilities the sum of four hundred thousand dollars ($400,000).

J. H. WICKER.

Sworn to before me and subscribed in my presence by the said J. H. Wicker, this 13th day of May, 1872.

[NOTARIAL SEAL.] A. M. BAILY,
Notary Public.

TERRITORY OF DAKOTA,
County of Yankton:

I, Wilmot W. Brookings, being duly sworn, on oath say that I am worth over and above all incumbrances and liabilities the sum of thirty thousand dollars ($30,000).

W. W. BROOKINGS.

Subscribed and sworn to before me this 17th day of May, A. D. 1872.

[NOTARIAL SEAL.] C. J. B. HARRIS,
Notary Public in and for Yankton County, Dakota Territory.

TERRITORY OF DAKOTA,
County of Yankton:

I, J. R. Hanson, being duly sworn, on oath say that I am worth, over and above all incumbrances and liabilities, the sum of thirty thousand ($30,000) dollars.

J. R. HANSON.

Subscribed and sworn to before me this 17th day of May, A. D. 1872.
[NOTARIAL SEAL.] C. J. B. HARRIS,
Notary Public in and for Yankton Co., Dakota Territory.

TERRITORY OF DAKOTA,
County of Yankton, ss:

32 Walter A. Burleigh, being duly sworn, says he is worth the sum of one hundred thousand dollars ($100,000) over and above all debts and liabilities in property subject to execution.

W. A. BURLEIGH.

Subscribed and sworn to before me this 18th day of May, A. D. 1872.
[NOTARIAL SEAL.] PHIL. K. FAULK,
Notary Public.

TERRITORY OF DAKOTA,
County of Yankton, ss:

James M. Stone, of said county, being duly sworn, says that he is worth the sum of twenty-five thousand dollars ($25,000), over and above all debts and liabilities which he owns or has incurred, in property subje t to execution.

J. M. STONE.

Subscribed and sworn before me this 18th day of May, A. D. 1872.
[NOTARIAL SEAL.] C. J. B. HARRIS,
Notary Public in and for Yankton County, Dakota Territory.

The board of county commissioners then by a joint request demanded from said railroad company further security in the shape of a real estate mortgage, for the fulfillment of the conditions contained in the foregoing bond.

13. At a meeting of said board of county commissioners on the 11th day of June, 1872, the Dakota Southern Railroad Company tendered to said board a contract or bond, in the words and figures following, viz:

"Know all men by these presents that we, The Dakota Southern Railroad Company, a corporation duly organized under the laws of the Territory of Dakota, and recognized and declared to be a legal and valid corporation by act of Congress, approved May 27th, 1872, as principal, is held and firmly bound unto the county of Yankton, in said Territory of Dakota, in the penal sum of one hundred thousand dollars, which well and truly to be paid we do bind ourselves, our successors, on the part of said corporation, by her officers duly authorized thereto, firmly by these presents. Signed by the president of our said corporation, and sealed with our corporate seal, at Yankton, Yankton County, D. T., this 10th day of June, 1872. The condition of this obligation is such that, whereas a difference has heretofore arisen between the Dakota Southern Railroad Company and the said county of Yankton, in relation to their respective rights and obligations under the legislative enactment of the Territory of Dakota and the act of Congress bearing upon and having relation to the said Dakota Southern Railroad Company and the voting aid thereto by the several counties and townships of said Terri-

33 tory; and whereas the said parties have since come to a mutual understanding and agreement in relation to the said rights and obligations thereunder, and for the purpose of setting out the same more fully and particularly, and of securing all of the said rights to the said county of Yankton, do bind themselves firmly by these presents, conditioned in effect that the said railroad company above named shall complete the said Dakota Southern Railroad from the terminus or station of some railroad leading into the city of Chicago, Illinois, to and within the city of Yankton, as such limits existed on the 5th day of August, 1871, by virtue of the charter of said city, and in running order, constructed as well as the average of Western roads, and trains of cars actually run thereon, and with its track connected with some road so leading to Chicago, of the same *guage*, so as to give direct railroad communication between the city of Yankton and Chicago, without necessitating the breaking of bulk or transfer of freight at any such point of connection, and with further condition that said road shall be so completed and running on or before the first day of January, 1873; and with further conditions that said Dakota Southern Railroad Company and their successors shall build, construct, maintain, and operate the general repair and machine shops of the said company, and shall keep and maintain the office and books of said company at and within the city limits of said city of Yankton; that said Dakota Southern Railroad Company shall issue to said Yankton County at the time of the issue of the two hundred thousand county bonds or any part thereof, an equal amount of paid up certificates of stock in said railroad company, which shall not be subject to assessment, and which said stock shall entitle said county to two thousand votes and at least one director in the management and control of said railroad; that said Dakota Southern Railroad Company and their successors shall not continue said road westward from said city of Yankton, but shall make said city of Yankton its western terminus for the time of two years from date hereof; and in case of failure to comply with any of the above and foregoing conditions of said bond, each and every one of which is made an essential part thereof, then and in that event the damages arising from such failure and omission is hereby liquidated at the amount of the face of said county bonds so issued with the interest thereon accrued up to the time of recovery of judgment, and ten thousand dollars additional to cover expenses of engraving, lithographing, and issuing of said bonds, together with the costs and expenses of suit. But in case of compliance with each and every of the conditions and agreements herein named and enumerated in spirit and letter, according to its meaning and tenor, then this instrument shall be null and void; otherwise, of full force and virtue.

34 Executed this eleventh day of June, A. D. 1872, at Yankton, Dakota Territory.

THE DAKOTA SOUTHERN RAILROAD COMPANY,
By W. W. BROOKINGS, *President.*

Attest:
[D. S. R. R. CO. SEAL.] J. R. HANSON, *Secretary.*

Said railroad company also tendered as security a real estate mortgage, given by five private individuals and duly recorded at Yankton County. And thereupon the said bond and mortgage were accepted and approved by said board of county commissioners

At the same meeting said board adopted the following resolutions:

Resolved, That the board of county commissioners waive the right to

inspect the work on the Dakota Southern Railroad, as such right refers to in resolution of this board of November 8th, 1871.

Resolved, That the chairman of the board of county commissioners and the county clerk are hereby authorized to issue to the president of Dakota Southern Railroad Company one hundred thousand dollars of Yankton County bonds voted in aid to said road, taking his receipt for the same. Thereupon the chairman signed and issued one hundred thousand dollars of said bonds, commencing with number one (1) to number one hundred (100), inclusive, and the county attested the same.

CHAS. EISEMAN, *Chairman.*

Approved:

[YANKTON CO. SEAL.] E. IVERSON, *Clerk.*

13. On the 13th day of October, 1872, the board of county commissioners, at a meeting then held, received from the said railroad company a sworn estimate of H. C. Switt, chief engineer of said railroad company, showing an expense incurred by said railroad company for the construction of its railroad of $396,330, and then said board adjourned and made a personal examination of said railroad.

14. On the 25th day of October, 1872, at a meeting of said board of county commissioners the following resolution was adopted:

Resolved, That Commissioner G. B. Hoffman be, and is herebo, authorized to *oast* the two thousand votes of Yankton County for the election of directors for the Dakota Southern Railroad on the 31st of October next, and that this board of county commissioners request the election of Geo. B. Hoffman as the director that the county is entitled to as per agreement. That said Hoffman attended said meeting and was elected such director.

35 15. At the meetings of the said board of county commissioners on the 27th of October, 1872, November 9th, 1872, and November 27th, 1872, the question of issuing the balance of said $200,000 of bonds to said railroad company was called up, but no definite action was taken in the matter which was acceptable to said railroad company, until December 10th, 1872, when said board adopted the following resolution, viz:

Resolved, That the conditions for the payment of the last one hundred thousand dollars in county bonds of Yankton County for the aid of the Dakota Southern Railroad Company be, and are hereby, modified as follows:

Fifty thousand dollars to be paid to the Dakota Southern Railroad Company on the completion of said road to the county line of Yankton County. And the remaining fifty thousand dollars to be paid to said company on the completion of said road to and within the limits of the city of Yankton, provided the road reaches said point on or before the 1st day of February, 1873.

Resolved, That the last installment of fifty thousand dollars of bonds be placed in trust for said railroad company in the First National Bank of Sioux City, Iowa, to be paid to them on reaching the city as per contract, on or before February 1st, 1873.

16. Afterwards, to wit, on or after January, 1873, said $100,000 of bonds came into the hands of said railroad company, and were by said railroad company turned over to Wicker, Meckling & Co., in part payment for constructing and equipping said road, the said Wicker, Meckling & Co. receiving them from said railroad company at 100 cents on the dollar, under their said contract of construction.

17. The said bonds were all engraved together in one lot and were not changed after they were received by the county of Yankton from the engraver, except in affixing the county seal and the signature of the chairman of the board of county commissioners, and the signature of the register of deeds thereto. They were all dated July 1, 1872, and were numbered as follows: The first issue of $100,000 was numbered from 1 to 100 inclusive, and the balance of $100,000 were numbered from 101 to 200 inclusive. The following is a sample copy of one of said bonds:

36 UNITED STATES OF AMERICA, TERRITORY OF DAKOTA.

$1,000. No. 181. $1,000.

Act of the legislative assembly of the Territory of Dakota, approved by the Congress of the United States.

County of Yankton, railroad aid bond.

Payable in twenty years from date with interest at eight per cent. per annum.

The County of Yankton promise to pay to the holder of this bond on the first day of July, eighteen hundred and ninety-two, for value received, the sum of one thousand dollars, in lawful money of the United States of America, payable at the Farmers' Loan & Trust Company, in the city of New York, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the first day of January and July of each year, in like lawful money of the United States of America, at the Farmers' Loan & Trust Company in the city of New York, upon presentation and delivery of the proper interest coupons hereto annexed.

This bond being one of a series of bonds of like tenor and date, numbered from 1 to 200 inclusive, and amounting in the aggregate to the sum of two hundred thousand dollars, these being the only bonds issued by said county.

In witness whereof the said county of Yankton has caused this bond to be signed by the chairman of its board of county commissioners, and attested by the register of deeds of said county and its corporate seal to be hereunto affixed at the city of Yankton in said county, this first day of July, A. D. one thousand eight hundred and seventy-two.

CHAS. EISEMAN,
Chairman Board of County Commissioners, Yankton County.

E. IVERSON,
Register of Deeds, Yankton County, D. T.

REGISTER OF DEEDS AND EX OFFICIO COUNTY CLERK,
YANKTON CO., DAKOTA TER.

Each bond of the first series had attached to it when issued 40 coupons. The balance had only 39 coupons attached to each bond when issued, one coupon having matured before the last $100,000 were issued. The coupons to each bond were numbered from 1 to 40 inclusive, and each coupon had also another number upon it corresponding to the number of the bond to which it was attached when the bond was issued.

18. The following are copies of the coupons which the plaintiff produced in court on the trial of this case, and introduced in evidence.

37 The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 118.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 118.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of Jannary, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 181.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars, on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 181.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars, on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 168.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of Jannary, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 168.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

38 The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 169.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 169.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of Jannary, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 181.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars, on the first day of January, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 170.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1874, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 181.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1874, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 168.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

39 The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1874, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 167.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1874, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 169.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 112.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 112.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 116.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 116.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

40 The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1874, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 170.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 167.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 169.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 168.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 111.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 111.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

41 The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1876, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 167.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 167.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1876, at the Farmers' Loan and Trust Com-

pany, in the city of New York, being six months' interest on bond No. 119.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 119.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of January, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 170.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

The county of Yankton promise to pay to the bearer forty dollars on the first day of July, 1875, at the Farmers' Loan and Trust Company, in the city of New York, being six months' interest on bond No. 170.

CHAS. EISEMAN,
Chairman Board Co. Commissioners.

E. IVERSON,
Register of Deeds.

42 19. On the 3d of March, 1873, the said board of county commissioners, by resolution adopted at a meeting then held, released the mortgage heretofore mentioned, given to secure the bonds of said railroad company.

20. On the 14th of July, 1873, said board of county commissioners adopted the following resolution, viz:

Resolved, That George B. Hoffman, a member of this board, and also a director in behalf of the county of the Dakota Southern Railroad Company be, and he is hereby authorized and directed to take such steps, legal or otherwise, as he may deem necessary or advisable, to protect the interest of Yankton County in said railroad company, and for the purpose to employ counsel to aid him in making the investigation and negotiations and to bring suit or suits in behalf of the county against any person or persons, or corporation, that he may deem necessary to protect such interest.

21. On the 16th day of July, 1873, said board of county commissioners adopted, at a meeting then held, the following preamble and resolution, viz:

Whereas it is deemed necessary in order to protect this county's interest in the Dakota Southern Railroad Company to commence suit against said company and others, and to apply for a temporary injunction therein; and whereas the statute require' upon such injunction that the plaintiff shall enter into an undertaking with or without securities to the defendant in such sums as shall be required by the court or judge:

Now, therefore, be it resolved, that this county will enter into such undertaking, and the chairman of the board be, and he is hereby authorized, empowered and directed to execute for and in the name of the county any and all undertaking that may be required in such suit or proceedings, or in any action relating to such interest, and to affix the seal of the county thereto, and cause the same to be attested by the county clerk, and procure sureties upon such undertakings, if the same shall be required.

22. On the 23d day of July, 1873, said county, by its district attorney, P. K. Faulk, and Moody & Cramer, attorneys, employed by said Hoffman for said county, commenced suit and filed its complaint against the said Dakota Southern Railroad Company, and others, averring, among other things, that said county was a stockholder in said railroad company to the amount of $200,000 and that Wicker, Meckling & Co., a part of the defendants in said suit, had received $200,000 in the county bonds of Yankton County for part compensation in constructing the road of said company, and that said Wicker, Meckling & Co. had agreed to allow said railroad company $180,000 therefor, and that said railroad company were about to issue to and for the benefit of said Wicker, Meckling & Co. bonds secured by mortgage on said railroad to the amount of
43 $1,200,000, which said plaintiff charged to be fraudulent and prejudicial to the interests of said county as a stockholder in said railroad company. The said complaint was verified by G. B. Hoffman, one of the county commissioners, and was in the words and figures following, viz:

Complaint.

In district court, 2d judicial district.

TERRITORY OF DAKOTA,
County of Yankton, ss:

THE COUNTY OF YANKTON
vs.
THE DAKOTA SOUTHERN RAILROAD COMPANY, Chas. G. Wicker, Joel A. Wicker, and J. S. Meckling, comprising the firm of Wicker, Meckling & Co., W. W. Brookings, John A. Burbank, and Joseph R. Hanson.

The said plaintiff, the county of Yankton, brings this action on behalf of itself and all other stockholders of said railroad company, and complaining of the above-named defendants, says that said defendants Dakota Southern Railroad Company is a corporation organized under and by virtue of the general incorporation act of the Territory of Dakota, passed and approved June 6th, 1868; that said company was organized in the summer of 1871, and has its office, under the articles of incorporation, at Yankton; that the plaintiff is a stockholder in said company, and was and is a holder of two thousand shares of stock therein, of $100.00 each share, and this action is brought by said plaintiff in this behalf, and in behalf of all other stockholders of said company who choose to join therein; that the capital stock of said company, as authorized by the articles of incorporation, is one million five hundred thousand dollars, divided into shares of $100 each, and is owned by

many persons, some of whom are unknown to this plaintiff and are beyond the jurisdiction of the court.

Plaintiff further says, that on the 31st day of October, A. D. 1871, said Wicker, Meckling & Co., then composed of the above named members of said firm, and one Milton Weston, who has since withdrawn from said firm and has no interest therein, entered into a contract in writing with five of the directors of said railroad company, by which they agreed with said directors of said railroad company, for and in consideration of such sum as it shall reasonably be worth, to construct and equip for said railroad company a railroad from the city of Yankton, D. T., to Sioux City or Le Mars, in the State of Iowa, as said Wicker,
Meckling & Co. might elect, the payment for such construction
44 and equipment to be made to said Wicker, Meckling & Co. as the work progressed in the stock of the company, in the avails of the subsidies granted or voted to said railroad company, and in the bonds of such company, except the stock of such company, to the amount of one-half of the capital stock thereof, to wit, $750,000, was to be issued to said Wicker, Meckling & Co. immediately upon the execution and delivery of such written contract, which contract is in the words and figures following, to wit:

This article of agreement, made and entered into this thirty first day of October, A. D. 1871 (eighteen hundred and seventy one), in the city of Yankton, Dakota Territory, by and between W. W. Brookings, M. K. Armstrong, George H. Wetmore, J. R. Hanson, D. T. Bramble, J. M. Stone, and Dr. W. A. Burleigh, the board of directors of the Dakota Southern Railroad, of the city of Yankton, Territory of Dakota, the party of the first part, and J. H. Wicker, C. G. Wicker, J. S. Meckling, and Milton Weston, constituting the firm of Wicker, Meckling & Co., of the city of Chicago, and State of Illinois, party of the second part, witnesseth:

That for and in consideration of certain conditions, provisions, and payment hereinafter mentioned, the party of the second part hereby agree to build, construct, and equip, for the Dakota Southern Railroad Company, a railroad from the city of Yankton, D. T., to Sioux City or Le Mars, in the State of Iowa, as the second party shall elect, which railroad, when completed, shall be in all respects equal to any newly constructed road in the West; and further agrees that the aforesaid railroad shall be completed by the first day of January, A. D. 1873 (eighteen hundred and seventy-three), upon the terms and conditions, namely:

1st. The party of the first part shall, immediately upon the execution of these presents, pass into the hands of the party of the second part one-half of all the capital stock authorized to be issued by the charter of the Dakota Southern Railroad.

2d. At the next annual election of directors of said Dakota Railroad Company four of said directors shall be elected by the party of the first part, and three by the party of the second part.

3d. All the county and township bonds subscribed to the Dakota Southern Railroad shall be issued at the earliest moment that the terms of the subscription will allow, and shall be negotiated, and the proceeds deposited with the Manufacturers' National Bank, in Chicago, Ills., the president of which shall act as trustee of said fund, and shall pay over to the party of the second part said funds as they may be required, upon the certificate of the chief engineer, approved by the executive committee

of said railroad company, and said funds shall be used for the purchase of material and for construction purposes of said railroad.

45 4th. All donations, of whatever character, for the benefit of said Dakota Southern Railroad, which are or may be subscribed or obtained, shall be in their order of their availability handed over to said second party, in manner provided in section number three.

5th. The party of the first part shall pay to the party of the second part, in the first-mortgage bonds of said railroad, an amount not to exceed ($20,000) twenty thousand dollars per mile, including sidings of the Dakota Southern Railroad; said bonds shall bear not less than eight per cent. interest per annum, and shall run not less than twenty years, and shall be made payable, principal and interest, at such place in the city of New York as the party of the second part may elect, the interest to be payable semi-annually, and said bonds shall be paid to the party of the second part whenever, in their opinion, the necessity of construction of said road may require.

6th. The first party shall procure the right of way for the Dakota Southern Railroad through Yankton County, and also all necessary depot and warehouse ground or grounds for the necessary buildings for the use of said railroad, and grounds necessary for side tracks or for connection with steamboats or government warehouses on the levee, in the city of Yankton, D. T., and all shall be furnished free of cost to the party of the second part by the Dakota Southern Railroad Company.

7th. The entire construction and management of all matters pertaining to the construction of said railroad shall be under the direction and control of the party of the second part, and the books of the railroad company shall be open to the inspection of each member of the construction company.

8th. It is hereby agreed by the parties hereto that in case of delay from legal or unavoidable causes the time for the fulfillment of this contract shall be extended in proportion to the delay.

9th. The grading and building of said road through Yankton County to be completed by the fifteenth day of May, A. D. 1872 (eighteen hundred and seventy-two).

In witness whereof we have hereunto this day and date set our hands and seals.

(Signed) J. M. STONE, *President.* [SEAL.]
J. R. HANSON, *Secretary.* [SEAL.
G. H. WETMORE, *Tr. & Supt.* [SEAL.]
M. K. ARMSTRONG. [SEAL.]
W. W. BROOKINGS. [SEAL.]
WICKER, MECKLING & CO. [SEAL.]

Witness:
ANDREW J. SWEETSER.
GEORGE W. KINGSBURY.

46 Plaintiff further says that in pursuance of said contract said Wicker, Meckling & Co. proceeded to and did build, construct, and equip said road, not as they had agreed, in all respects equal to any newly constructed road in the West, but with very inferior material, such as cottonwood ties and light rails, and the grading and ditching very light and narrow, and not by the first day of January, A. D. 1873,

although they were not delayed by legal or unavoidable causes; but they completed the same about the first of February, A. D. 1873.

Plaintiff further says that Wicker, Meckling & Co., ever since said contract, had at all times had the control and management of said railroad company; that its board of directors have always been ready to do and have done whatever was required or demanded by said Wicker, Meckling & Co., and at the last annual election of stockholders of said company, held in Yankton on the 12th day of December, A. D. 1872, the said Wicker, Meckling & Co., having received the majority of all the capital stock of said company, elected the entire board of directors, consisting of several persons, to wit: said C. G. Wicker, J. S. Meckling, W. W. Brookings, John A. Burbank, George B. Hoffman, J. E. Rutter, and Scudder. That but five of said directors, to wit: said C. G. Wicker, said J. S. Meckling, said W. W. Brookings, said J. A. Burbank, and said George B. Hoffman, have acted as such, the other two named being residents of Chicago and taking no part in the transactions of said board, so far as the plaintiff or its duly empowered agents know or have been informed; and the said C. G. Wicker is president of the said board and J. R. Hanson is secretary and treasurer. Said Hoffman has no stock in and no interest in said road, except at the request of the county commissioners of said county, and in pursuance of an agreement to that effect he was by said stock elected a director in behalf of said county, but is wholly powerless to prevent or induce the action of said board, which is wholly controlled by said Wicker, Meckling & Co.

Plaintiff further says that said railroad company has never kept any books of account of the receipts and expenditures, and the said secretary and treasurer is and has been kept in entire ignorance of the financial condition of said company; nor has any account-books of any kind whatever been kept, the most being some loose and inaccurate memorandum of the transactions of the stockholders at their annual meeting and of the board of directors; that no profile of said line of road or report of its length or probable cost of the cuts or fills, of the bridges, their number or length, of the number or quality of ties or the length of rail, of the sidings, depots, or equipments, is on file with or has ever been made to said
47 company; and therefore this plaintiff and all other stockholders are in entire ignorance of the cost of such road and its equipments, but plaintiff alleges that a reasonable price for the construction and equipment of said road would not exceed the sum of $900,000, as the same has been constructed and equipped by said Wicker, Meckling & Co. Plaintiff further says that said Wicker, Meckling & Co. subscribed for and received and now hold eleven thousand five hundred and sixty shares of said Dakota Southern Railroad Company stock, amounting to ($1,156,000) one million one hundred and fifty-six thousand dollars, for which they have not paid one cent, except such offset as they may be entitled to for the construction and equipment of said road. That they have received in addition thereto $200,000 in the county bonds of Yankton County, for which they agreed to allow said railroad company the sum of $180,000, also $15,000 of Elk Point Township bonds, worth $13,500, and they have also received large donations of money, bonds, labor, and material made to said railroad company along the line of said road, as an inducement for the location of depots, side tracks, and other facilities for doing business upon and by means of said railroad, amounting in all to a large sum of money and much valuable real and personal property, the particulars of which said plaintiff cannot state because of the loose, careless, negligent, and fraudulent manner in which said railroad company's books and records are kept. Plaintiff further says that notwithstanding said

railroad has been completed since about the first day of February, 1873, said Wicker, Meckling & Co. have been permitted to and have all the time retained possession thereof, receiving and retaining all their rents and profits of said road, and they, said Wicker, Meckling & Co., have been engaged in the carrying of passengers and freight on said road between Sioux City and Yankton and intermediate points, using therefor all the road, side tracks, depots, engines, cars, and all other equipments and property of said road, and has received large sums of money therefor, and have not accounted in any manner to said railroad company for the same or any part thereof, and said company and its duly authorized officers, and particularly its secretary and treasurer, are in entire ignorance of what amount has been so received or of any matter which it is his duty, as secretary and treasurer, to be informed of, but plaintiff alleges that the amount of which said Wicker, Meckling & Co. has so secured is not less than $1,500,000.

Plaintiff further says that sometime since said Wicker, Meckling & Co. had control of said board of directors, the precise time of which is unknown to this plaintiff, they, the said Wicker, Meckling & Co., for the purpose of defrauding this plaintiff and other stockholders and
48 rendering the stock held by this plaintiff and others entirely worthless, procured to be delivered to themselves twelve hundred thousand dollars of the bonds of said railroad company, secured by a mortgage on all property and franchises of said company, being twelve hundred of such bonds of $1,000 each, having date July 1st, 1872, having twenty years to run and having 8 per cent. per annum interest, and still has said bonds in their possession without paying anything therefor or accounting to said company in manner for the same. That at a meeting of the board of directors of said company, held on the 7th day of June, 1873, it being the only meeting of said board since the day of the annual meeting on the 12th day of December, 1872, whereat there was present said C. G. Wicker, president, and J. S. Meckling, both of said firm of Wicker, Meckling & Co., & said Brookings and Burbank, and no other members of said board, at the request of said Wicker, Meckling & Co., and upon the suggestion and motion of said C. G. Wicker, the said board of directors, by the votes of said Wicker and Meckling, authorized the return and cancellation of said aforementioned bonds and the issue to said Wicker, Meckling & Co. other bonds to the amount of $1,200,000 of said railroad company, and gave to said C. G. Wicker full power and authority to negotiate and sell the same at such price and upon such terms as he should see fit and proper, under a pretense of paying said Wicker, Meckling & Co. for the construction and equipment of said Dakota Southern Railroad, whereas in truth and in fact said Wicker, Meckling & Co. were indebted at the time, and are still indebted, to said railroad company many hundred thousand dollars over and above the costs of the construction and equipment of said road, and said plaintiff alleges that the purpose and object of said action of the board was to put such incumbrance upon the road as to render the stock of the plaintiff and other bona fide stock of said railroad entirely worthless. Plaintiff further says that the said action of said board appears in the records of the said board, as follows:

"The president, C. G. Wicker, presented the following preamble and resolution, which was adopted by the board, as follows:

"Whereas the Dakota Southern Railroad Company entered into contract with Wicker, Meckling & Co. on the 31st day of October, 1871, for building that portion of the Dakota Southern Railroad known as the first division, and being from Sioux City, in the State of Iowa, to the

city of Yankton, in the Territory of Dakota, the conditions of said contract being that said Wicker, Meckling & Co. were to have for the building and equipment of said piece of road all the subsidies voted to the same, the bonds of the company to the extent of twenty thousand
49 dollars per mile, and a majority of the capital stock of the company; and whereas the contracting parties have completed their contract, and have been paid for the same in stock and subsidies as agreed between the parties, and have also received the first-mortgage bonds of the company bearing date July 1st, 1872, having twenty years to run, and payable, principal and interest, at the office of the Farmers' Loan & Trust Company, in the city of New York, interest payable semi-annually; and whereas the said bonds are now in the hands of Wicker, Meckling & Co., who desire to have the same cancelled and a new issue of bonds made for a like sum: Be it therefore

"Resolved, That the president and secretary of the company be, and they are hereby, authorized to cancel the said twelve hundred thousand dollars of first mortgage bonds, and to issue in their stead six hundred thousand dollars first-mortgage bonds to bear date July 1st, 1873, with interest at the rate of 8 per cent. per annum, payable semi-annually at the office of the Farmers' Loan & Trust Company, in New York, having thirty years to run, and also to issue six hundred thousand dollars in second mortgage bonds, bearing date July 1st, 1873, with interest at 8 per cent. per annum, also payable semi-annually at the office of the Farmers' Loan & Trust Company, in New York, and not to run over thirty years from date, and that C. G. Wicker, president of the company, is hereby authorized to sell or negotiate the sale of all bonds provided for by this resolution, at such prices and in such sums and on such conditions as he may elect. And the aforesaid C. G. Wicker, president of the aforesaid company, is hereby fully empowered and authorized to do all and everything whatsoever required to be done in the issue and sale of such bonds as may be required for the complete issue and negotiation of the same. And the said C. G. Wicker, for the purpose of the issue and negotiation of said bonds, is hereby empowered with all the powers now vested in the board of directors of the Dakota Southern Railroad Company, with full power to make such contract and agreement with any party or parties as he may deem for the interest of said company."

Said plaintiff further says that said C. G. Wicker and said J. R. Hanson, secretary and treasurer, are about to issue said bonds, and will unless restrained by an order of the court, and will thus encumber the road to an amount exceeding its entire value, and will thus make the stock of this plaintiff of no value whatever, and that such is the intention of the parties so having control of said board of directors.

Plaintiff further alleges and charges that upon no pretense of paying the debts due either Wicker, Meckling & Co. or any other parties, is it necessary to bond said road, for the entire capital stock of said
50 company has been subscribed, and in fact, since said Wicker, Meckling & Co. have had control of said board, stock of railroad company in excess of the whole capital stock thereof has been issued and is now outstanding to the amount of $134,200.00, and not one cent has ever been paid thereon except by the county of Yankton, $200,000; the town of Elk Point, $15,000, which has been paid in full, and except which said Wicker, Meckling & Co. may be entitled to offset for the construction and equipment of said road, and said members of the board of directors have it in their power to collect enough upon the unpaid

stock of said road to pay all the debts due by the company and have a large surplus left.

That in addition to what said Wicker, Meckling & Co. own and hold said director Brookings owns and holds $45,200, and said director Burbank owns and holds $121,000 of said capital stock, not one cent of which has been paid, although by the calls already made, twenty per cent. thereof is due, and the company has been organized and doing business for two years.

Plaintiff further says that at the time of the application of said company for the bonds of this county in payment for the stock now held by this plaintiff, there existed upon the records of the proceedings of said board of directors a resolution authorizing any parties to return the stock they may have subscribed and have their stock cancelled and their subscription rescinded; that the board of commissioners of said plaintiff, fearing such action would embarrass said company and lessen the amount of the funds available for its use, requested that such resolution be repealed before such county bonds were issued, which requisite, it was pretended, was complied with, and said board of directors informed said board of county commissioners that a resolution repealing such obnoxious order of the board of directors had passed such board; but in truth no minute of such repeal was ever made, and since that time a large amount of stock subscribed by responsible parties has been returned, and their subscriptions cancelled, and new stock been issued to said Wicker, Meckling & Co. and to parties not responsible, and this plaintiff fears that unless the court shall restrain them, said Wicker, Meckling & Co. will return and cancel their stock and subscription, and other parties who are responsible will do the same.

Wherefore plaintiff prays that a temporary restraining order issue injoining said Wicker and said Hanson and said company from executing and delivering, and said Wicker, Meckling & Co. from receiving said $1,200,000 of bonds ordered at the meeting of the board of directors of said company held on the 7th day of June, 1873, or at any other time; that said Wicker, Meckling & Co. be restrained from selling, negotiating, or in any manner disposing of the bonds of said
51 company that have or may come to their possession, and that said Wicker, Meckling & Co. be required to account to said railroad company for the par value of the stock so subscribed and received by them, to wit, for $1,156,000; that they be required also to account to said company for $180,000 agreed to be paid for the Yankton County bonds, $13,500 for the Elk Point Township bonds, for all they have received in the way of money and real and personal property as subsidies to said railroad company for the location of depots, side tracks, and other facilities for doing business upon said road, and to that end that they be decreed to make to said company all necessary and proper deeds and conveyances of real property so received; and that they be also required to account for all the receipts of said road for freight and passengers since they have been in possession of the same, having credit for the actual running expenses of said road during said time, and that the price for the construction of said railroad as the same shall reasonably be worth, to offset against the indebtedness of said Wicker, Meckling & Co. to said railroad company, and upon the final hearing herein, that such order injoining the further issue of bonds be made final, and the bonds now in the hands of Wicker, Meckling & Co. be decreed to be returned to said railroad company and such bonds and the mortgage to secure the same be cancelled; that a further temporary restraining order issue restraining the said company and the officers thereof from

cancelling any of the said subscribed stock, except the surplus over the amount of the capital stock allowed by the articles of incorporation, until the debts of said railroad company be fully paid and satisfied; for the costs of these proceedings, and for such other and further relief in the premises as shall be just and equitable.

MOODY & CRAMER, AND
PHIL. K. FAULK, *Dist. A'tty,*
Attorneys for Plaintiff.

TERRITORY OF DAKOTA,
County of Yankton, ss:

George B. Hoffman, of said county, being duly sworn, says that he is one of the county commissioners of Yankton County, and has been authorized and instructed by the said board of county commissioners to cause to be instituted the action in which the foregoing complaint is made; that he has been fully authorized and empowered by said board to take any and all necessary steps in the prosecution of said action, and is the agent of said county for that purpose. That he has read the foregoing complaint, signed by the attorneys of said plaintiff, and that the same is true of his own knowledge, except as to those matters stated on the information and belief, and as to those matters he believes it to be true. That the reason of his knowledge in the premises is the
52 fact that he is one of the directors of said company, and has examined the records and proceedings of the board of directors thereof, and the other books of said company, is a resident of the city of Yankton and has been such since the organization of said railroad company, and the facts stated in said complaint are within his own knowledge, and are true.

GEO. B. HOFFMAN.

Subscribed and sworn to before me this 22d day of July, A. D. 1873.

A. H. BARNES,
Associate Justice, Supreme Court, D. T.

And an injunction bond was filed by the plaintiff, signed by the chairman of the board of county commissioners and the county clerk, with the county seal thereto affixed.

Sept. 13th, 1873, the answer of the Dakota Southern Railroad Company was filed, and on the 31st day of October, 1873, the following stipulation was entered into between the parties to said suit and filed in the district court, 2d judicial district, in and for Yankton County, where said suit was brought and was then pending, viz:

Stipulation.

YANKTON COUNTY
vs.
DAKOTA SOUTHERN R. R. ET AL.

Now at this time, to wit, the 31 day of October, 1873, came the parties to the above-entitled action, and for the purpose of compromising, settling, and adjusting the above-entitled suit, hereby stipulate and agree, each with the other, that the following shall be entered on the records of this court in said case, and that said decree, when so entered,

shall have all the force and effect as though based on a finding of said court.

CHARLES EISEMAN,
JOHN J. THOMPSON,
County Commissioners of Yankton County, D. T.
PHIL. K. FAULK,
Dist. Attorney Yankton County, D. T., of Plaintiff's Attorneys.
WICKER, MECKLING & CO.
DAKOTA SOUTHERN RAILROAD CO.
By J. S. MECKLING, *Supt.*
COPELAND, JOY & WRIGHT,
AND JOHN CURRIER,
Attorneys for Defendants.

53 October 31st, 1873, the following decree was entered:

Decree.

THE COUNTY OF YANKTON
vs.
THE DAKOTA SOUTHERN RAILROAD COMPANY, Charles G. Wicker, Joel H. Wicker, and Jonas S. Meckling, known and doing business under the firm and style of Wicker, Meckling & Co., et al.

And now at this time, to wit, the 31st day of October, 1873, it being the 16th day of the October term of the district court of the second judicial district, in and for Yankton County, Dakota Territory, this cause came on to be heard upon the pleadings heretofore filed, and by agreement of the parties to said action the following decree is hereby made and entered by the court, to wit: It is ordered, adjudged and decreed that the action and bill of the plaintiff be dismissed, and that in consideration of a certain bond of even date herewith, executed by said defendants, the Dakota Southern Railroad Company, and Wicker, Meckling & Co., which bond the said plaintiff hereby accepts in full accord and satisfaction of any and all actions and causes of action stated or set out in plaintiff's bill of complaint in this case; also for all relief prayed for and demanded in said bill of complaint, that the injunction or restraining order heretofore granted in said case be, and the same is hereby, vacated and dissolved, and that the defendants, and each and every of them, be absolved from any and all obligations to obey said injunction or restraining order; that the said Dakota Southern Railroad Company, defendant herein, be allowed, ordered and adjudged to make, execute and deliver to its co defendants, Wicker, Meckling & Co., said last named company being composed of Charles G. and Joel H. Wicker and Jonas S. Meckling, first-mortgage bonds to the amount of twelve hundred thousand ($1,200,000) dollars, said bonds to be secured by a mortgage on the said railroad and on all the property, real and personal, of said company. It is further ordered, adjudged and decreed that the said Wicker, Meckling & Co. may negotiate, sell, hypothecate, or in any manner dispose of such mortgage bonds in any amounts, or in any manner as to them shall seem best, for their own use and benefit, but it is expressly decreed that no more than the above-named amount of said bond shall be delivered to or received by Wicker, Meckling & Co., including bonds already issued to said Wicker, Meckling & Co. That the said Wicker, Meckling & Co. are hereby expressly allowed and permitted

to surrender and return any or all of the bonds heretofore issued to them by said railroad company, and that in the event the said
54 Wicker, Meckling & Co. surrender and return any or all such bonds, then and in such case it shall be the duty of, and the said railroad company shall make, execute and deliver to the said Wicker, Meckling & Co. other bonds, equal in amount to those surrendered in conformity with, and as provided for in the resolution of the board of directors of said railroad company, adopted at a meeting of said board, held June 7th, 1873, a copy of which is set out in full in plaintiff's bill of complaint; that none of said bonds provided for as aforesaid shall draw a greater rate of interest than eight per cent. per annum, payable semi-annually, nor shall any of said bonds issued, or which may be issued, to said Wicker, Meckling & Co., by said railroad company, run, or fall due, in any less time or period than twenty years; and that upon the surrender of any bonds as hereinbefore provided, and the executing of other bonds in place of those surrendered, such bonds so given up and surrendered shall be cancelled and destroyed. And it is further ordered that each of the parties pay their own costs in said case. And it is further ordered and decreed, by consent of parties as aforesaid, the injunction bond of said plaintiff, heretofore given in said cause upon the preliminary injunction herein, be, and the same is hereby, annulled and cancelled, and no claim on demand for damages by reason of the dissolution of the injunction or otherwise shall be made by said defendants.

By the court.

A. H. BARNES, *Judge.*

23. On the 29th day of July, 1873, said board of county commissioners, at a meeting then held, adopted the following resolution, viz:

Resolved, That the bond given by the Dakota Southern Railroad Company, as principal, and Wicker, Meckling & Co., W. W. Brookings, W. A. Burleigh, J. R. Hanson, J. M. Stone and J. H. Wicker, as sureties, dated April 23d, 1872, be, and is hereby, cancelled, the conditions of the same having been complied with.

24. On the 30th day of August, 1873, at a meeting of said board of county commissioners, the following resolution was adopted, viz:

Whereas a meeting of the stockholders of the Dakota Southern Railroad Company has been called to meet at Yankton on the 2d of September, 1873; and whereas, the county of Yankton being the owner and holder of $200,000 of stock in said railroad company, it is important said county should be represented at said meeting: Therefore be it

Resolved, That Col. G. C. Moody be, and is hereby, appointed and authorized to represent the county of Yankton at said stockholders'
55 meeting or any adjourned meeting of the same, and to cast the vote of the county thereat, and to do all necessary and proper acts with reference thereto, and to enforce and protect the interest of said county at said meeting.

That said Moody attended the meeting of the stockholders of said railroad company as authorized, and voted for said county as a stockholder, holding the said $200,000 of stock.

25. On the 4th day of November, 1873, at a meeting of said board of county commissioners, the following resolution was adopted, viz:

Resolved, That a certain resolution, empowering Commissioner G. B. Hoffman to enter suit against the Dakota Southern Railroad, dated July 14th, 1873, being recorded on the 7th day of the July session of the board of county commissioners, be and is hereby rescinded; and that

the certain bond, dated October 31st, 1873, of the Dakota Southern Railroad Company, and Wicker, Meckling & Co., and resolution of the board of directors of the Dakota Southern Railroad, to authorize certain officers of said railroad company to execute the same, be recorded on the minutes of the proceedings of said board, showing settlement and compromise between Yankton County and Dakota Southern Railroad Company and Wicker, Meckling & Co., be entered into, and that said suit be and is hereby declared fully compromised on the basis of said bond.

The bond referred to in said resolution, dated October 31st, 1873, was given by the said railroad company and Wicker, Meckling & Co. to said Yankton County, and is to the following effect, viz:

This agreement, made and entered into this 31st day of October, A. D. 1873, by and between the Dakota Southern Railroad Company and Wicker, Meckling & Co., parties of the first part, and the county of Yankton, party of the second part, witnesseth: That whereas a controversy has been heretofore pending in the 2d judicial district court, within and for Yankton County, wherein the said County of Yankton was plaintiff and the said Dakota Southern Railroad Company and the said Wicker, Meckling & Co., and others, was defendants; and whereas an agreement has been entered into by and between said parties, by which it is agreed to settle the matters in controversy between said parties, and the plaintiff is to dismiss said action in consideration of said parties of the first part agreeing to construct and erect and maintain at the city of Yankton, in said county, the round houses, depots, machine shops, and other improvements, and to do and perform certain other acts and things for and by said railroad company: Now, therefore, in consideration of the premises, it is agreed by the said parties of the first part that the said railroad company shall erect and maintain at the said city of Yankton, in said county, its round house for engine', all necessary and suit-
56 able passenger and freight depots, its principal machine shops for the manufacture and repair of its rolling-stock and other machinery, and shall place in such machine shops all proper and suitable machinery for such purpose, and that all of his aforesaid mentioned improvements shall be fully completed and ready for use and occupation within eighteen months from the date hereof, shall be commenced within ten days, and shall be pushed to a completion as fast as the weather and the pecuniary resources of said railroad company and Wicker, Meckling & Co. shall permit; and it is further agreed by said first parties that they will expend for such purposes hereinbefore mentioned not less than fifty thousand dollars ($50,000), which shall be actually expended in good faith in making said improvements; and it is further agreed by said parties of the first part that they will keep and maintain their general office for the transaction of their railroad business at the said city of Yankton, and that said company shall for a period of not less than three years from the date hereof run one passenger train from the said city of Yankton, lying over night at Yankton, and departing in the forenoon and returning from Sioux City in the afternoon daily, except Sundays. It is further agreed and understood by and between said parties that in case of a failure of said parties of the first part to do and perform their said agreements hereinbefore mentioned, that they will forfeit and pay to the said party of the second part the just and full sum of fifty thousand dollars ($50,000), as liquidated damages for the non-fulfillment of said agreement or any of them, which sum said party of the second part may recover of said first parties, as upon the promis-'ory note of said parties of the first part.

In witness whereof the said railroad company has caused its vice president to set his hand as such hereunto, and has set its seal, and said Wicker, Meckling & Co. has set their hands and seals hereunto the day and year aforesaid.

DAKOTA SOUTHERN RAILROAD SEAL.

W. W. BROOKINGS,
V. President.
WICKER, MECKLING & CO. [SEAL.]

26. In the years 1872, 1873, 1874, and 1875 the county of Yankton levied a tax to pay interest on said R. R. bonds given to the Dakota Southern R. R. Co. That $39,624.90 of said R. R. tax has been collected by the proper authorities of said county. That only $25,800 of said coupons have been redeemed by said county, which were taken in payment for R. R. tax, no money being paid to redeem the same. That the balance of the money so raised has been used for other purposes.

27. That in the month of December, 1872, at a regular session
57 of the legislature of Dakota Territory the following act was passed and was approved by the governor of said Territory on the 21st day of December, 1872, viz:

An act to authorize the county commissioners of Yankton County to borrow money in certain cases.

Be it enacted by the legislative assembly of the Territory of Dakota:

SECTION 1. That the county commissioners of the county of Yankton be and are hereby authorized to borrow any amount of money not to exceed in any one year over eight thousand dollars, and for a time not to exceed twelve months. Said money to be used only to meet the interest on the bonds voted by Yankton County in aid of the Dakota Southern Railroad, and for no other purpose, and to draw no higher interest than allowed by law in other cases.

SEC. 2. It shall be lawful for the county commissioners to issue railroad interest warrants, drawing interest at the rate of (10) ten per cent. per annum, not to exceed eight thousand dollars in the aggregate in any one year, the same being receivable by the county treasurer for railroad tax.

SEC. 3. This act shall take effect and be in force from and after its passage and approval.

Approved December 21st, 1872.

That at the same session an act was passed and approved appropriating $735 to pay the expenses of the extra session of the legislature of said Territory which convened April 18th, 1871, which act is as follows, viz:

Joint resolution providing for the payment of the officers and members of the extra session of the legislative assembly of Dakota Territory, convened April 18th, A. D. 1871.

Be it enacted by the legislative assembly of the Territory of Dakota:

SECTION 1. That the officers and members of the legislative assembly of Dakota Territory, convened in extra session by order of the acting governor, April 18th, A. D. 1871, be allowed the sums set opposite their respective names in the following schedule, as full pay for their services at said extra session:

MEMBERS OF THE COUNCIL.

	Jacob Branch	$15 00
	Wm. H. Cuppett	24 00
	Hugh Fraley	18 00
	Wm. T. McKay	24 00
	J. M. Stone	15 00
	C. H. McIntyre	15 00
	S. W. Kidder	18 00
	Nelson Miner	18 00
	J. W. Turner	18 00
58	J. C. Kennedy	21 00
	Emory Morris	21 00
	Geo. T. Rea, enrolling clerk	12 00
	A. W. Howard, secretary	21 00
	Carrie Foster, assistant secretary	12 00
	M. Hoyt, chaplain	6 00

MEMBERS OF HOUSE.

	Charles Allen	$24 00
	F. J. Cross	18 00
	Geo. H. Hand	15 00
	A. P. Hammon	15 00
	John Hancock	42 00
	O. B Iverson	24 00
	H. A. Jerauld	24 00
	N. Learned	15 00
	A. J. Mills	18 00
	E. Miner	15 00
	R. Mostow	18 00
	S. L. Parker	21 00
	Ole Sampson	15 00
	A. F. Shaw	18 00
	J. C. Sinclair	21 00
	N. Wherry	18 00
	Geo. I. Foster, chief clerk	12 00
	C. B. Valentine, assistant clerk	27 00
	John McClellan, sergeant-at-arms	12 00
	—— Danielson, fireman and messenger	12 00
	Joseph Ward, chaplain	6 00
	E. T. White, sergeant-at-arms	12 00
	James M. Stone, rent, etc	75 00
		$735 00

SEC. 2. There is hereby appropriated out of the money in the Territorial treasury, not otherwise appropriated, the sum of seven hundred and thirty-five dollars, for the payment of the amounts specified in the foregoing schedule.

SEC. 3. The Territorial auditor is hereby authorized and instructed to audit the several accounts as herein specified, and to issue his warrants on the treasurer.

SEC. 4. This act shall take effect and be in force from and after its approval by the governor.

Approved Jan. 9th, 1873.

28. That the said railroad company issued to said Yankton County two full paid certificates of stock in said railroad company, each for 1,000 shares of $100 each, one certificate dated June 10th 1872, and the other October 14th, 1873; that said certificates of stock were received from said railroad company by said board of county commis-
59 sioners of said county, and that the said certificates have never been surrendered, returned, or cancelled, but are now held by the county treasurer of said county as the property of said county. Said certificates of stock have written across the face of the same that they are not subject to assessment.

29. That said Wicker, Meckling & Co. sold the $200,000 of Yankton County bonds to W. N. Coler & Co., a firm of bankers, brokers, and dealers in municipal bonds in New York city, before January 1st, 1874, for the sum of $140,000 in cash, receiving $75,000 for the first $100,000, and $65,000 for the second $100,000. That said Wicker, Meckling & Co. had no interest in the sale of said bonds by said firm of W. N. Coler & Co. That C. G. Wicker, one of the members of the firm of Wicker, Meckling & Co., who made the sale, informed said Coler & Co., at the time of the sale to them, that the said bonds had been taken by Wicker, Meckling & Co. from the Dakota Southern Railroad Company at 100 cents on the dollar, in part payment for constructing the road of said railroad company, and also informed said Coler & Co. of the substance of the construction contract, under which said Wicker, Meckling & Co. had agreed to construct and equip said railroad, and that by the terms of said contract Wicker, Meckling & Co. were to receive said bonds at par.

30. The plaintiff is the owner and holder of the interest coupons sued upon in this case, and there is no proof in this case to show that said firm of W. N. Coler & Co. or the plaintiff did not in good faith purchase the said coupons sued upon in this case, or that either of said parties did not purchase the same before maturity, for value and without any actual notice of illegality or irregularity in the issue or negotiation of said coupons or the bonds to which they were attached, except such constructive notice as the law imputes to every purchaser of municipal bonds purporting to be issued under legislative acts.

31. That said Yankton County never voted or attempted to vote any other aid to the Dakota Southern Railroad Company, or any other railroad company than that hereinbefore specified; that said Yankton County never voted or attempted to vote upon the question of subscribing to the stock of the said railroad company; that there is no other railroad in said Territory known or called the "Dakota Southern Railroad Company," except the company hereinbefore mentioned; that no aid by donation, loan of credit or subscription was ever voted or attempted to be voted to the said railroad company by any county or township in said Territory, except $15,000 by the township of Elk Point, in Union County, and $200,000 by the said Yankton County.

32. The plaintiff duly presented the coupons sued upon at the Farmers' Loan & Trust Company in New York City, at the
60 maturity thereof, and demanded payment, but payment was refused, as the defendant had no funds there to meet the same.

33. That on the 24th day of June, 1872, there was filed in the records of Yankton County a mortgage given by said railroad company to the Farmers' Loan and Trust Company on its said road, to secure bonds executed by said railroad company to the amount of $1,200,000. On the 18th day of April, 1874, said mortgage was cancelled and discharged of record. On the 2nd and 3rd days of February, 1874, said railroad

company executed two other mortgages on its road to said Farmers' Loan & Trust Company, in apparent pursuance of the decree hereinbefore set forth for the total sum of $1,200,000, which last-mentioned mortgages are still uncancelled.

34. That the western line of Bon Homme County as designated in the act of Congress of May 27th, 1872, is about 42 miles west of Yankton; that the distance from Yankton eastwardly to the point of the terminus of said railroad under the articles of incorporation is about 57 miles, and the distance from Yankton to Sioux City is 61 or 62 miles.

P. C. SHANNON,
Judge.

JUNE 13, 1876.

Conclusions of law.

1. That the plaintiff is the owner and holder of the interest coupons sued upon in this case; and became the owner and holder of the same for value before maturity, and without any other notice of illegality in the issue and negotiation of said coupons, or the bonds to which said coupons were attached, than such constructive notice as the law charges every purchaser of municipal bonds with, purporting to be issued under legislative acts.

2. That in accordance with the law as held and decided by a majority of the supreme court of this Territory (in the case of John Treadway vs. The County of Yankton et al., at the last session of said court), the plaintiff in this action cannot recover, because there was no lawful power or authority to issue any of the bonds to which these coupons were attached, and the same are illegal and void, even in the hands of otherwise innocent holders.

3. This complaint ought therefore to be dismissed at the costs of the plaintiff, and let judgment be entered accordingly.

P. C. SHANNON,
Judge.

JUNE 13, 1876.

To which decision of the court, finding that the defendant was entitled to judgment against the plaintiff, the said plaintiff by its counsel then and there duly excepted.

61 And thereupon, the said plaintiff, by its attorneys, on said last mentioned day, duly served and filed in said cause the following exceptions to said decision:

In district court, 2d judicial district.

TERRITORY OF DAKOTA,
County of Yankton, ss:

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

1. Take notice that the plaintiff excepts to the second of the conclusions of law found herein by Mr. Justice Shannon, on the 13th day of June, 1876.

2. That he also excepts to the third of the said conclusions of law.

3. That he also excepts to said conclusions of law generally in that it is not decided that upon the facts proved herein, that the defendant is indebted to the plaintiff for the amount of the interest coupons sued upon.

WM. POUND AND
S. W. PACKARD,
Plaint'ff's Att'ys.

YANKTON, *June 13th* 1876.

To Messrs. GAMBLE, MOODY AND SPINK,
Defendant's Attorneys.

TERRITORY OF DAKOTA,
Yankton County, ss:

Samuel W. Packard, being duly sworn, on oath says that he served the within notice of exceptions on S. L. Spink, one of the attorneys for the defendant in the within-mentioned action on this 13th day of June, 1876, by delivering him a copy thereof.

SAMUEL W. PACKARD.

Subscribed and sworn to before me this 13th day of June, 1876.
[SEAL.] A. J. FAULK, *Clerk.*

Afterwards, and on the same day the said plaintiff, by its attorneys made a motion in said cause to correct the said decision, which motion was as follows:

In the district court, 2d judicial district.

TERRITORY OF DAKOTA,
Yankton County:

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

62 And now comes the said plaintiff, by its attorneys, and moves the court to set aside and correct the decision herein rendered for the defendant, and to find in favor of the plaintiff, and that it is entitled to judgment against said defendant for the amount of the coupons sued upon in this case.

WM. POUND,
S. W. PACKARD,
Plaintiff's Attorneys.

Upon the hearing of said motion the court overruled the same, and made and filed the following order overruling the same.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

The motion of the plaintiff in this cause to correct the findings herein

coming on to be heard, and the attorneys of the said defendant being present, the said motion is considered and denied.

By the court.

P. C. SHANNON, *Judge.*

JUNE 13, 1876.

To which ruling the plaintiff, by attorney, excepts, and this bill is sealed.

[SEAL.] P. C. SHANNON, *Judge.*

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Afterwards the plaintiff, by its counsel, moved the court to arrest the judgment in this action, which motion was in the words and figures following, viz:

In the district court, 2d judicial district.

TERRITORY OF DAKOTA,
Yankton County:

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

And now, June 13, 1876, comes the said plaintiff, by its attorneys, and moves the court to arrest the judgment in this cause, because it appears from the record in this action that the defendant is not entitled to judgment against the plaintiff, but on the contrary the said record manifestly shows that the said plaintiff is entitled to a judgment against the said defendant as prayed in its complaint herein.

WM. POUND AND
S. W. PACKARD,
Plaintiff's Attorneys.

63 But the court overruled said motion and made and filed the following order, viz:

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

The motion of the plaintiff herein to arrest the judgment in this cause coming on to be heard, and the attorneys of said defendant, to wit, Messrs. Spink, Moody, and Gamble, being present, the same is heard, and, on consideration, denied.

By the court.

P. C. SHANNON,
Judge.

JUNE 13, 1876.

To which ruling the plaintiff, by attorney, excepts, and this bill is sealed.

[SEAL.] P. C. SHANNON,
Judge.

This bill of exceptions is signed and sealed and made a part of the record in this cause, this 13th day of June, 1876, and the clerk of said court is directed to attach the same to the judgment-roll herein.

By the court.

P. C. SHANNON,
Judge.

Judgment.

In district court, second judicial district.

TERRITORY OF DAKOTA,
County of Yankton:

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

And now, June 13th, 1876, this action having been brought to trial by the court (a trial by jury having been duly waived), and a decision therein having been rendered for the defendant and filed; now it is adjudged that the complaint of the said plaintiff is hereby dismissed, and that the said defendant go hence without day, and recover from the said plaintiff the costs of this action taxed at—

By the court.

P. C. SHANNON,
Judge.

Attest:
[SEAL.]

A. J. FAULK,
Clerk.

Afterwards, that is to say, on the 14th day of June, A. D. 1876, the said First National Bank of Brunswick, Maine, by its counsel, produced the writ of the Territory of Dakota for the correction of errors of and upon the premises, commanding that the decision and judgment, with all things thereunto relating, be transmitted to the supreme court of the Territory of Dakota, the tenor of which said writ is as follows, to wit:

64 *Writ of error.*

UNITED STATES OF AMERICA,
Territory of Dakota, ss:

The people of the Territory of Dakota to the honorable the judge of th district court of the Territory of Dakota, for the 2d judicial district in and for the county of Yankton, greeting:

Whereas on the 13th day of June, A. D. 1876, at the April term, 1876, of the district court of Dakota Territory, 2d judicial district, in and for Yankton County, the county of Yankton obtained a decision and recovered a judgment against the First National Bank of Brunswick, Maine, in a certain action pending in said court, brought by said First National Bank of Brunswick, Maine, as plaintiff, against the said County of Yankton, as defendant, to recover certain sums of money claimed to be due said plaintiff by said defendant, as it is said in a petition for a writ of error filed in the supreme court of said Territory by said First

National Bank of Brunswick, Maine, and because in the record and proceedings, as also in the obtaining of said decision and in the rendition of said judgment, a manifest error hath happened to the great damage of the said First National Bank of Brunswick, Maine, as by its said petition hath been stated, which said petition has been considered by the chief justice of said supreme court, and the writ of error therein prayed for allowed; therefore, you are hereby commanded that if the decision or judgment aforesaid be therein given, then the record and proceedings aforesaid, with all things thereunto relating, to the said supreme court of the Territory of Dakota, to be holden at Yankton, on the 4th Tuesday in June, 1876, under your seal, distinctly and openly, you send, together with this writ; that the record and proceedings aforesaid being inspected, the court may further cause to be done therein, for the correcting that error, what of right, and according to the laws and customs of this Territory, should be done.

Witness the honorable P. C. Shannon, chief justice of the said supreme court, this 14th day of June, A. D. 1876.

[SEAL.] B. S. WILLIAMS,
Clerk of said Supreme Court.

WM. POUND and S. W. PACKARD,
Plaintiff's Attorneys.

Received and filed June 14, 1876.

A. J. FAULK,
Clerk.

In pursuance whereof, and according to the organic act of the Territory, and the act of the assembly in such case made and provided, a record of this decision and judgment aforesaid, with all things
65 thereto relating, together with said writ of error annexed, is hereby transmitted to the supreme court accordingly.

Witness the Hon. P. C. Shannon, judge of said district court, this 21st day of June, A. D. 1876.

Judge of said District Court.

Attest:
[SEAL OF DIST. COURT.] A. J. FAULK,
Clerk of said District Court.

Citation.

The Territory of Dakota to the County of Yankton, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the Territory of Dakota, to be holden at Yankton, in said Territory, on the fourth Tuesday of June, A. D. 1876, pursuant to a writ of error allowed and filed in the clerk's office of the district court of the Territory of Dakota, 2d judicial district, in and for Yankton County, wherein the First National Bank of Brunswick, Maine, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why a certain decision obtained and a certain judgment rendered against the said plaintiff in error, and in your favor, on the 13th day of June, A. D. 1876, in said district court, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable P. C. Shannon, chief justice of said supreme court, this fourteenth day of June, A. D. 1876.

P. C. SHANNON,
Chief Justice of said Supreme Court.

Attest:
B. S. WILLIAMS,
Clerk of said Supreme Court.

WM. POUND AND
S. W. PACKARD,
Plaintiff's Attorneys.

TERRITORY OF DAKOTA,
Yankton County, ss:

Samuel W. Packard, being duly sworn, on oath says that he served the within and foregoing citation upon the County of Yankton, said defendant in error, by delivering to J. R. Gamble, the district attorney for said county, and one of the attorneys of record for said defendant
66 in error, a true copy of said citation, and exhibited the original thereof to him, this 14th day of June, A. D. 1876.

SAMUEL W. PACKARD.

Subscribed and sworn to before me this 21st day of June, A. D. 1876.
[SEAL.] A. J. FAULK,
Clerk of the District Court in and for said Yankton County.

Assignment of errors.

In the supreme court of the Territory of Dakota. June term, A. D. 1876.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

And now comes the said First National Bank of Brunswick, Maine, the plaintiff in error, by its attorneys, Wm Pound and S. W. Packard, and says that in the proceedings aforesaid there is manifest error in this, to wit:

1st. The judge erred in finding the 2d conclusion of law found by him.

2d. The judge erred in finding the 3d conclusion of law found by him.

3d. The judge erred in deciding in favor of the defendant and against the plaintiff. The judge should have found that the plaintiff was entitled to recover upon the interest-coupons sued upon.

4th. The court erred in overruling the defendant's motion to correct the decision.

5th. The court erred in overruling the defendant's motion in arrest of judgment.

6th. The court erred in rendering judgment for the defendant and against the plaintiff. The court should have rendered judgment against the defendant and in favor of the plaintiff for the amount of the coupons sued upon.

And, therefore, the said First National Bank prays that the decision

may be set aside, and that the judgment may be reversed and annulled, and that speedy justice may be done in the premises.

WM. POUND AND
S. W. PACKARD,
Plaintiff's Attorneys.

67 Error to the district court of Yankton County.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine, pl'ffs in error,
vs.
THE COUNTY OF YANKTON, DEF'T IN ERROR.

The court being duly opened.

And now, this 15th day of August, A. D. 1876, comes William Pound and S. W. Packard, esq'rs, with argument in behalf of said plaintiffs in error.

And now comes J. R. Gamble, esq., in the behalf of the County of Yankton, said defendants in error, with the closing argument.

Attest:

B. S. WILLIAMS, *Clerk.*

68 *Judgment.*

TERRITORY OF DAKOTA:

In supreme court. Error to the district court of Yankton County, June term, 1876.

THE NATIONAL BANK OF BRUNSWICK, MAINE, pl'ff in error,
vs.
THE COUNTY OF YANKTON, DEF'T IN ERROR.

And now, this 23rd day of August, A. D. 1876, the writ of error having been brought in for argument at the general term of this court, and after hearing counsel for the plaintiff in error for, and counsel for the defendant in error against, it is adjudged that the judgment of the district court be affirmed and the cause remanded to that court for further proceedings, and that the defendant in error recover of the plaintiff costs amounting to four dollars and ten cents.

By the court.

P. C. SHANNON,
Chief Justice.

Attest:

B. S. WILLIAMS, *Clerk.*

69 TERRITORY OF DAKOTA, *ss:*

In supreme court of said Territory.

FIRST NATIONAL BANK OF BRUNSWICK, MAINE,
vs.
THE COUNTY OF YANKTON.

And now, this sixth day of July, A. D. 1877, comes William Pound, one

of the attorneys for the said First National Bank of Brunswick, Maine, and prays this honorable court that an appeal to the Supreme Court of the United States from the decision and judgment of the supreme court of said Territory, rendered in the above entitled cause on the 23rd day of August, A. D. 1876, be allowed said First National Bank of Brunswick, Maine, upon the filing of an undertaking to the acceptance of the chief justice of said supreme court of said Territory for the prosecution of said appeal to effect, and the payment of costs herein, in the sum of two hundred and fifty dollars.

WM. POUND,
Attorney for First National Bank of Brunswick.

And now, July 6th, 1877, above petition presented in open court, and the appeal allowed.
By the court.

P. C. SHANNON,
Chief Justice.

FIRST NATIONAL BANK OF BRUNSWICK, MAINE,
vs.
THE COUNTY OF YANKTON.

Filed in open court this 6th day of July, A. D. 1877.
B. S. WILLIAMS, *Clerk.*

70 Know all men by these presents that we, J. W. C. Morrison & August Kunze, of the county of Yankton, and Territory of Dakota, are held and firmly bound unto the county of Yankton in the full and just sum of two hundred and fifty dollars, to be paid to the said county of Yankton, its successors and assigns, to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventeenth day of September, A. D. 1877.

Whereas, lately, at a term of the supreme court of the Territory of Dakota, in a suit depending in said court between the First National Bank of Brunswick, as plaintiff and appellant, and the County of Yankton as defendant, judgment was rendered against the said First National Bank of Brunswick, and the said First National Bank of Brunswick having obtained and taken an appeal, which has been duly allowed, to reverse the judgment in the aforesaid suit, and a citation directed to the said county of Yankton, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, A. D. 1877:

Now the condition of the above obligation is such, that if the said The First National Bank of Brunswick shall prosecute its appeal to
71 effect & answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

AUGUST KUNZE. [SEAL.]
JOHN W. C. MORRISON. [SEAL.]

In presence of—
E. T. WHITE.

Approved by—

P. C. SHANNON,
Chief Justice of S. Court of Dakota.

TERRITORY OF DAKOTA,
County of Yankton, ss:

On this 17th day of September, A. D. 1877, before me personally appeared John W. C. Morrison and August Kunze, known to me to be the persons who are described in and who executed the above and within instrument, and severally acknowledged to me that they executed the same.

[W. W. BROOKINGS. NOTARIAL SEAL. YANKTON, D. T.] W. W. BROOKINGS,
Notary Public.

TERRITORY OF DAKOTA,
County of Yankton, ss:

John W. C. Morrison and August Kunze, being severally sworn, each for himself says: The said John W. C. Morrison says he is a resident and freeholder of the county of Yankton, in the Territory of Dakota, and that he is worth in property the sum of five hundred dollars over and
72 above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said August Kunze for himself says that he is a resident and freeholder of the county of Yankton, in the Territory of Dakota, and that he is worth in property the sum of five hundred dollars over and above all his debts and liabilities, and exclusive of all property exempt from levy and sale on execution.

AUGUST KUNZE.
JOHN W. C. MORRISON.

Subscribed & sworn to before me this 17th day of September, A. D. 1877.

[W. W. BROOKINGS. NOTARIAL SEAL. YANKTON, D. T.] W. W. BROOKINGS,
Notary Public.

(Endorsement:) First Nat. Bank of Brunswick, Maine, vs. Yankton County. Bond.

Filed in my office this 17th day of September, A. D. 1877.
B. S. WILLIAMS, *Clerk.*

73 The United States of America to the county of Yankton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1877, pursuant to an appeal taken by and allowed to the First National Bank of Brunswick, as plaintiff and appellant, from a judgment rendered against it by the supreme court of the Territory of Dakota, on the 23rd day of August, A. D. 1876, and in favor of yourself, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, & why speedy justice should not be done to the parties in that behalf.

Witness the honorable P. C. Shannon, chief justice of the said supreme court of the Territory of Dakota, this 17th day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

P. C. SHANNON,
Chief Justice.

74 UNITED STATES OF AMERICA,
Territory of Dakota, County of Yankton, ss:

E. T. White, being duly sworn, on oath states that he served the within citation upon the within mentioned county of Yankton by de-

livering to G. C. Moody, of counsel for said county of Yankton, a true copy of the same on the 17th day of September, A. D. 1877.

E. T. WHITE.

Subscribed & sworn to before me, the clerk of the supreme court of said Territory of Dakota, this 17th day of September, A. D. 1877.

[SEAL OF SUP. COURT.] B. S. WILLIAMS,
Clerk of the Territorial Sup. Court for Dakota.

(Endorsement:) Citation First Nat. Bank of Brunswick, Maine, vs. Yankton County.

Filed in my office this 17th day of September, A. D. 1877.

B. S. WILLIAMS, *Clerk.*

75 TERRITORY OF DAKOTA, *ss:*

In Supreme Court.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine,
vs.
THE COUNTY OF YANKTON.

I, B. S. Wiliams, clerk of the supreme court for the Territory of Dakota, certify that I have carefully compared the foregoing copy with the original record on file in this office in the above entitled cause, and that the same is a true and complete copy of all the papers on file and from the journal proceedings had in this cause, and that they are true and correct copies of such journal entries.

In testimony whereof I hereunto set my hand and affix the seal of the said supreme court this 3rd day of October, A. D. 1877.

[SEAL.] B. S. WILLIAMS,
Clerk.

76 (Endorsement:) Territory of Dakota. In supreme court, June term, 1876. The First National Bank of Brunswick, Maine, vs. the County of Yankton. Record.

Filed in my office this 26th day of June, A. D. 1876.

B. S. WILLIAMS,
Clerk.

No. 1. Wm. Pound & S. W. Packard, att'ys for pl'ff in error.

77 In the Supreme Court of the United States to the October term' A. D. 1877.

THE FIRST NATIONAL BANK OF BRUNSWICK, Maine, appellant,
vs.
THE COUNTY OF YANKTON, APPELLEE.

And now comes the *the* said the First National Bank of Brunswick, Maine, the appellant, by Samuel W. Packard, its solicitor, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The supreme court of the Territory of Dakota erred in not holding that the judge of the district court erred in finding the 2nd conclusion of law found by him.

2nd. The said supreme court also erred in not holding that the
78 judge of the district court erred in finding the 3rd conclusion of law found by him.

3rd. The said supreme court erred in not holding that the judge of the district court erred in deciding in favor of the said county of Yankton and against the said First National Bank of Brunswick, Maine.

4th. The said supreme court erred in not holding that said district court erred in overruling the motion of the said First National Bank of Brunswick, Maine, to correct the decision.

5th. The said supreme court erred in not holding that the district court erred in overruling the defendant's motion in said district court in arrest of judgment.

79 6th. The said supreme court erred in not holding that the said district court erred in rendering judgment for the defendant in said court against the plaintiff in said court.

7th. The said supreme court also erred in affirming the judgment of said district court.

8th. The said supreme court erred in not reversing the said judgment of said district court.

Therefore the appellant, the First National Bank of Brunswick, Maine, prays that the said judgments of the said supreme court of the Territory of Dakota and of said district court may be reversed, & that speedy justice may be done in the premises.

SAMUEL W. PACKARD,
Appellant's Att'y.

(Indorsement on cover:) No. 269. The First National Bank of Brunswick, Maine, appellant, vs. The County of Yankton. Dakota Territory supreme court. Filed 11th October, 1877.

OFFICE OF THE CLERK U. S.
FILED
MAR 2 1883
S. W. MIDDLETON, CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 269.

THE FIRST NATIONAL BANK OF BRUNSWICK,
Appellant.

VS.

THE COUNTY OF YANKTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF DAKOTA TERRITORY.

ARGUMENT FOR APPELLANT,

BY

GRANT & GRANT.

FILED

SUPREME COURT OF THE UNITED STATES.

No. 269.

THE FIRST NATIONAL BANK OF BRUNSWICK,
Appellant.

vs.

THE COUNTY OF YANKTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF DAKOTA TERRITORY.

ARGUMENT FOR APPELLANT.

Statement of the Case.

This was a writ by the plaintiff against the defendant to recover interest on certain bonds, issued by the county of Yankton, under an act of the Territorial Legislature, approved 21st of April, 1871, and an act of Congress, approved 27th of May, 1872. (See petition, page 5.)

The defence set up in the answer (page 7) that the bonds were sold for less than ninety cents on the dollar of what the plaintiff had voted; that the railroad put a mortgage of $1,200,000 on its property—50 per cent. more than the entire cost—whereby the stock of the county was rendered valueless; and that there was no law authorizing the issue of the bonds. (Copies of the acts of the Territory and of Congress authorizing the same annexed to the answer—pp. 8, 9, 10.)

The cause was tried by the Court below, by consent, where there was a judgment for defendant (record, page 45), which was affirmed by the Supreme Court, and appealed to this Court.

The record contains, from pages 11 to 45, a finding of all the facts in the case, from the first proposal to issue the bonds until their actual issue and delivery to Wicker and others, contractors, and their sale by Wicker & Co. to Cole & Co.

We shall only refer to such facts as are necessary to understand the case, which in this court depends solely upon the

power of Congress to authorize Territorial legislatures and counties to issue bonds to aid in building railroads.

The act of the Territorial Legislature (record, page 9), Sections 1, 2, 3, 4, 5, 6, &c., authorize County Commissioners to issue bonds, to aid railroads, by donation, loan of credit, or subscription to their capital stock, upon a vote of the people of the county. This act was passed April 21st, 1871. We believe the objection to the validity of this act is, that it was passed at a called session of the Legislature, after it had been in session forty days in the same year.

This objection it is not necessary to consider, because the act of Congress of 27th of May, 1872, (Record, page 10,) in annulling this act made an express exception in favor of Yankton county and the Dakota Southern Railroad. It says: "But the passage of this act shall not invalidate or impair the organization of the Company heretofore organized for the construction of the Dakota Southern Railroad, leading from Sioux City, Iowa, by way of Yankton, the capital of the Territory, to the west line of Bonhomme county, or any vote that has or may be given by the counties of Union, Clay, Yankton and Bonhomme, granting aid to said railroad, or any subscriptions thereto, or anything authorized or that may be done in pursuance of the provisions of said legislative act," etc. The Dakota Southern Railroad, as organized, was declared to be a legal and valid corporation, and the provisions of said act of the Legislature, so far as they authorize and for the purpose of validating any such act to aid this road, are declared to be in full force. The right of way was granted to the railroad, and it was required to issue stock upon bonds delivered at their par value.

The bonds (Record, p. 25,) recite as follows:

UNITED STATES, TERRITORY OF DAKOTA.

$1,000 No. 181 $1,000

Act of the Legislative Assembly of the Territory of Dakota.

Approved by the Congress of the United States.

The county of Yankton promises to pay to the holder of this bond one thousand dollars, etc.

This bond being one of a series of like tenor and date, numbered 1 to 200 inclusive, amounting in the aggregate to $200,000, these being the only bonds issued by the county.

The bonds were issued in pursuance of an election and vote, on a notice (record, page 16), which provided that they should not be given or donated except in payment for work actually

done or performed on the railroad, nor until it was finished or security that it would be completed given, as the county should require. Every prerequisite of the act was complied with; the bonds were issued for work done; the county received stock at par for the bonds, and the Railroad Company delivered the bonds to Wicker, Meckling & Co. in part payment for work done on the road, at par.

It further appears in the finding of facts (record, page 31), that the county brought a suit against the Railroad Company to restrain the execution and delivery of a railroad mortgage on the railroad, because it would diminish the value of their stock, and that this bill was dismissed, with the approval of the county.

The Court found as fact that the Railroad Company give full paid stock, not assessable, for the $200,000 of bonds at their par value; that the county received the certificates of stock, and still retains them.

That Wicker & Co. sold said bonds to Coles & Co, for $140,000, seventy-five per cent. for the first $100,000, and sixty-five per cent. for the last; that Wicker & Co. had nothing to do with the sales made by Coles & Co.

That the plaintiff is the holder and owner of the coupons sued upon, and there is no proof to show that Coles & Co., or the plaintiff did not in good faith purchase the coupons sued upon in this cause, or that they did not purchase the same before maturity, for value, and without notice of irregularity or illegality in their issue, except such constructive notice as the law imputes to every purchaser of municipal bonds, purporting to be issued under legislative acts.

Argument in the Case.

It fully appears by the record, that there was a law of the Legislature of Dakota, ratified by an act of Congress, authorizing the issue of those bonds. That there was a lawful election, and power conferred on the County Court to issue them. That the County Commissioners complied with every requisition of the law,

That the bonds were delivered to the railroad for work done, at par, and stock, full paid, at par, delivered to the county.

That the railroad sold the bonds to Wicker & Co. at par, and they sold them at a discount; and the plaintiffs are *bona fide* purchasers, without notice.

The only question that can be raised is that there was no law authorizing the issue of the bonds.

As we understand, the Supreme Court of Dakota holds that the Territorial Legislature had no authority to pass the act authorizing their issue.

But Congress had such power, and Congress by the validating act authorized their issue, upon terms, which have been complied with.

We do not suppose that counsel opposed to us will argue that Congress has not power to authorize the issue of bonds by Territories or Counties in Territories for any purpose which Congress may think needful or proper.

It is a power not questioned at this day, and which requires no argument to establish, and the judgment of the Supreme Court should be reversed.

GRANT & GRANT, *for Appellants.*

OFFICE SUPREME COURT U.S.
FILED
APR 10 1880
O. M. MIDDLETON, CLERK

IN THE

United States Supreme Court,

[CASE NO. 269.]

OCTOBER TERM, A. D. 1879.

THE FIRST NATIONAL BANK OF BRUNSWICK, MAINE, Appellant,

vs.

THE COUNTY OF YANKTON, Appellee.

Appeal from the Territorial Supreme Court of Dakota.

BRIEF AND ARGUMENT FOR APPELLANT,

BY

S. W. PACKARD.

A CASE INVOLVING THE VALIDITY OF BONDS ALLEGED TO HAVE BEEN ISSUED BY YANKTON COUNTY, DAKOTA TERRITORY, IN AID OF THE DAKOTA SOUTHERN RAILROAD COMPANY.

CHICAGO:
HORACE O'DONOGHUE, LEGAL PRINTER, 42 BRYAN BLOCK, 170 LA SALLE STREET.
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STATEMENT OF THE CASE.

This was a suit brought by the appellant upon certain coupons attached to bonds purporting to have been issued by the county of Yankton, in the Territory of Dakota.

The bonds were in the words and figures following, except that each bond had a separate number :

UNITED STATES OF AMERICA.

TERRITORY OF DAKOTA.

$1,000. No. 181. $1,000.

ACT of the Legislative Assembly of the Territory of Dakota, approved by the Congress of the United States.

County of Yankton Railroad Aid Bond. Payable in twenty years from date, with interest at 8 per cent. per annum.

The county of Yankton promise to pay to the holder of this bond, on the first day of July, eighteen hundred and ninety-two, for value received, the sum of one thousand dollars, in lawful money of the United States of America, payable at the Farmers' Loan and Trust Company, in the city of New York, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the first day of January and July of each year, in like lawful money of the United States of America, at the Farmers' Loan and Trust Company, in the city of New York, upon presentation and delivery of the proper interest coupons hereto anexed.

This bond being one of a series of bonds of like tenor and date, numbered from 1 to 200, inclusive, and amounting in the aggregate to the sum of two hundred thousand dollars, these being the only bonds issued by said county.

In witness whereof, the said county of Yankton has caused this bond to be signed by the Chairman of its Board of County Commissoners, and attested by the Register of Deeds of said county, and its corporate seal to be hereto affixed, at the city of Yankton, in said county, on this first day of July, A. D. one thousand eight hundred and seventy-two.

CHAS. EISEMAN,
Chairman Board of County Commissioners, Yankton County.

E. IVERSON,
Register of Deeds, Yankton County, D. T.

REGISTER OF DEEDS,
Yankton Co., Dakota Territory,
and
EX OFFICIO COUNTY CLERK.

To each bond were annexed certain interest coupons, each for the sum of $40, maturing semi-annually, for the interest thereon.

The coupons sued upon had been attached to bonds Nos. 167, 168, 169, 170, 181, 111, 112, 116, 118 and 119, and, without interest, amounted to $1,200.

The whole issue of bonds amounted to $200,000. The bonds numbered from 1 to 100, inclusive, were delivered to the Dakota Southern Railroad Company on the 1st day of June, 1872, and the balance of the issue, viz., bonds numbered from 101 to 200, inclusive, were not delivered to the said railroad company until on or after January, 1873.

The railroad company, after receiving the bonds, turned them over to the firm of Wicker, Meckling & Co., at 100 cents on the dollar, in part payment for constructing and equipping the railroad of said company, which runs from Sioux City, Iowa, to Yankton City, in Yankton County, Dakota Territory, a distance of 61 or 62 miles—Sioux City being, at the time this road was built, the nearest point to a railroad from Yankton County.

Wicker, Meckling & Co. sold the bonds to W. N. Coler & Co., a firm dealing in municipal bonds in New York City, who purchased them in good faith and for value; and afterwards some of them were purchased by the appellant, the plaintiff in the District Court, which "became the owner and holder of the same for value "before maturity, and without any other notice of ille- "gality in the issue and negotiation of the said coupons, "or the bonds to which said coupons were attached, than "such constructive notice as the law charges to every "purchaser of municipal bonds purporting to be issued "under legislative acts." (*Record, pp. 59, 60.*)

The appellant relies upon three several acts of the Territorial Legislature of Dakota and one act of Congress, for the necessary power to enable the municipal corporation to issue the bonds.

The first act was passed at an extra session of the Dakota Legislature, which convened in pursuance of a

call of the acting Governor of Dakota, on the 18th day of April, 1871, and remained in session for four days.

The act was approved April 21, 1871, and is set out in full on pages 14–16 of the record.

By the provisions of this act, if valid, ample power was conferred upon the county of Yankton to issue the bonds in question. And there is no complaint of any want of conformity to the requirements of this act.

The validity of this act is denied, however, by Yankton County, on the ground that Congress, under the Constitution, could not create a local government in a Territory, and confer upon it power to pass such an act which enables the county to create a debt which can only be paid by taxation; and because, as the county claims, the Territorial Legislature had no authority to convene in extra session, in April, 1871.

The sixth section of the organic act of Dakota provides as follows (see 12 Statutes at Large, page 241):

"And be it further enacted, that the legislative power "of the Territory shall extend to *all rightful subjects of* "*legislation* consistent with the Constitution of the United "States and the provisions of this act; but no law shall "be passed interfering with the primary disposal of the "soil; no tax shall be imposed upon the property of the "United States; nor shall the lands or other property of "non-residents be taxed higher than the lands or other "property of residents; nor shall any law be passed im-"pairing the rights of private property; nor shall any "discrimination be made in taxing different kinds of prop-"erty; but all property subject to taxation shall be in "proportion to the value of the property taxed."

The claim is made that the Federal Government is one of enumerated powers, and that the power to impose a tax upon private property within a given district, in aid of a railroad or local improvement, is not among the powers delegated to the General Government; and hence it is

argued Congress could not lawfully confer the power in question upon the Territorial Legislature.

The objection to the extra session is based upon the fact that "the members of such legislative assembly had "previously convened in regular session on the 5th day of "December, 1870, and had been and remained from that "date until the 13th day of January, 1871 (with the ex- "ception of the intervening Sundays, upon which days "said assembly did not convene), when such session was "adjourned without day. The said last day being called "in the journals of such legislative assembly as the for- "tieth day of said session, although said legislative assem- "bly had only been in actual session, transacting business, "on thirty-five days." (See the second special finding, page 19 of Record.)

The organic act provided that "the persons thus "elected to the legislative assembly shall meet at such "place, and on such day as the Governor shall appoint; "but thereafter the time, place and manner of holding "and conducting all elections by the people, and the ap- "portioning the representation in the several counties or "districts to the Council and House of Representatives, "according to the population, shall be prescribed by law, "as well as the day of the commencement of the regular "sessions of the legislative assembly: *Provided*, that no "session shall exceed the term of forty days, except the "first, which may be extended to sixty days, and no "longer."

(*See 12 Stat. at Large, pp. 240–241.*)

In the general appropriation bill, approved March 3, 1869 (See 15 Stat. at Large, p. 300), this *proviso* is found at the end of the appropriations for the governments, in the Territories. "*Provided*, that hereafter the members of "both branches of the legislative assemblies of the sev- "eral Territories shall be chosen for the term of two

" years, and the sessions of the legislative assemblies shall " be biennial. And each Territorial Legislature shall, at " its first session after the passage of this act, make pro- " vision by law for carrying this act into effect."

In pursuance of the said alleged act of the Territorial Legislature, approved April 21, 1871, the county commissioners duly called an election for September 2, 1871, to have a vote taken upon a proposition to donate aid to the Dakota Southern Railroad Company, in the shape of bonds amounting to $200,000, running twenty years, with interest at 8 per cent. per annum, payable semi-annually. Said bonds " not to be given or donated to said railroad " company except in payment for the grading, tieing, " building or other necessary work on said railroad to be " built by the said company, and that said bonds shall " only be given or donated in payment for work actually " performed on said railroad, and shall in no case be de- " livered faster than work on said road progresses; and " provided that said bonds shall not be issued by the " county commissioners or delivered to said railroad com- " pany until said railroad is completed and in running " order to and within the present limits of the city of " Yankton, or such security given that said railroad will " be so completed as said Yankton County shall require."

The popular election showed a large majority in favor of issuing bonds. The vote stood 543 for and 126 against the proposition. (*See Record, p. 24.*)

On the 8th of November, 1871, the Board of County Commissioners passed a resolution offering to extend the aid to the railroad company provided the railroad company should give the county a bond for $400,000, with approved securities, conditioned among other things, that the road should be completed by the 1st of January, 1873, and built of a certain gauge, and in a certain manner, and requiring the eastern terminus of the road to be connected with some other railroad leading into the city of Chicago,

Illinois, which necessitated an extension of the road four or five miles from the eastern terminus fixed by the articles of incorporation.

Afterwards, and on the 2d of January, 1872, the County Board modified the conditions of the bond required, so as to provide for an enlargement of the time for completion, in case of a general overflow of the Missouri River bottoms the ensuing spring.

As so modified the proposition was accepted by the railroad company. (*See Record, pp. 27–30.*)

At this juncture of affairs a question was raised (1) as to the legality of the incorporation of the Dakota Southern Railroad Company; and (2) as to the power of the legislative assembly to convene in extra session.

This interfered with the progress of the road, and it was feared the whole enterprise would have to be abandoned.

Thereupon Congress was appealed to and passed the "act in relation to the Dakota Southern Railroad Com-"pany," set out in the record on pages 16 to 18, and found in vol. 17, Statutes at Large, pages 162 and 163.

After the passage of this act of Congress the railroad company tendered a bond, as required by the county of Yankton, and also *issued to* the county certificates of full-paid stock for the full amount of the bonds. But this the county were not satisfied with, and required the railroad company to give another bond, with additional conditions, and secured by a real estate mortgage.

One of the new conditions imposed was that the railroad company should make the city of Yankton the western terminus for two years thereafter.

These new demands were acceded to by the railroad company, and the road was built as required, and certificates for $200,000 of full-paid stock were tendered to and accepted by Yankton County, and the $200,000 in bonds issued to the railroad company as heretofore stated.

The county has voted the stock and sued upon it as a stockholder in the road, and still holds it.

The railroad was built as required, and has been in operation ever since, giving Yankton County its first and only railroad communication with the outer world.

For five years taxes were regularly levied to meet the interest on these bonds. But only a portion of the money so raised was used to pay the interest on the bonds. The balance was "used for other purposes." (*Record, p. 56.*)

On the 14th day of January, 1869, at a regular session of the Dakota Legislature, an act was passed entitled: "An act relative to County Commissioners and County Clerks."

This became a law on the 14th day of January, 1869, and continued in force until repealed February 17, 1877.

The eighteenth section of that act provided as follows:

"The said commissioners shall have power to submit to "the people of the county, at any regular or special elec- "tion, whether the county will aid or construct *any road* "or bridge, or to submit to the people of the county any "question involving an extraordinary outlay of money by "the county; and said commissioners may aid any enter- "prise designed for the benefit of the county, as afore- "said, whenever a majority of the people thereof shall be "in favor of the proposition, as provided in this section."

Session Laws of Dakota for 1868–9, page 172.

This law, the appellant claims, conferred sufficient power, even though all the other legislation in reference to the matter should be disregarded.

Besides this act, the Territorial Legislature passed another act, at its regular session in 1872, entitled, "An "act to authorize the County Commissioners of Yankton "County to borrow money in certain cases."

It provides that the money borrowed shall "be "used only to meet the interest on *the bonds voted by*

" *Yankton County in aid of the Dakota Southern Rail-*
" *road.*"

This act is copied in full in the record, on page 57, and is published in the Session Laws of Dakota for 1872–3, page 130.

At the same session, the Territorial Legislature passed a bill appropriating $735 to pay the expenses of the extra session of the Legislature of said Territory, which commenced April 18, 1871.

This act is set forth in full on pages 57 and 58 of the record, and is published in the Session Laws of Dakota for 1872–3, pp. 190, 191.

The majority of the Supreme Court of the Territory, in the case of *Treadway* v. *Schnauber*, Treasurer of Yankton County, reported in 1 Dakota R., page 236, held these bonds null and void, for want of power in the county to issue the bonds.

In accordance with that decision, the District Judge, before whom this case was tried, held that the plaintiff in this case could not recover, although he was a *bona-fide* purchaser.

The District Judge, in accordance with the practice in the Territory of Dakota, made special findings of facts, which present a very full record of the action of the county in reference to these bonds. His conclusions of law were as follows:

" 1. That the plaintiff is the owner and holder of
" the interest coupons sued upon in this case, and became
" the owner and holder of the same for value, before
" maturity, and without any other notice of illegality in
" the issue and negotiation of said coupons or the bonds
" to which said coupons were attached, than such con-
" structive notice as the law charges every purchaser of
" municipal bonds with, purporting to be issued under
" legislative acts.

" 2. That in accordance with the law as held and
" decided by a majority of the Supreme Court of this

" Territory (in the case of *John Treadway* v. *The County* " *of Yankton et al.*, at the last session of said court), the " plaintiff in this action cannot recover, because there was " no lawful power or authority to issue any of the bonds " to which the coupons were attached, and the same are " illegal and void, even in the hands of otherwise innocent " holders.

" 3. This complaint ought, therefore, to be dismissed " at the cost of the plaintiff, and let judgment be entered " accordingly."

A writ of error was sued out to the Territorial Supreme Court, where the the judgment of the District Court was affirmed, and thereupon the appellant brought the case by appeal to this court for review.

ASSIGNMENT OF ERRORS.

1. The Supreme Court of the Territory of Dakota erred in not holding that the judge of the District Court erred in finding the second conclusion of law found by him.

2. The said Supreme Court alsoerred in not holding that the judge of the District Court erred in finding the third conclusion of law found by him.

3. The said Supreme Court erred in not holding that the judge of the District Court erred in deciding in favor of the said county of Yankton, and against the said First National Bank of Brunswick, Maine.

4. The said Supreme Court erred in not holding that the said District Court erred in overruling the motion of the said First National Bank of Brunswick, Maine, to correct the decision.

5. The said Supreme Court erred in not holding that the District Court erred in overruling the defendant's motion in said District Court in arrest of judgment.

6. The said Supreme Court erred in not holding that the said District Court erred in rendering judgment for the defendant in said court against the plaintiff in said court.

7. The said Supreme Court also erred in affirming the judgment of said District Court.

8. The said Supreme Court erred in not reversing the said judgment of said District Court.

APPELLANT'S POINTS.

I.

Within the Territories (especially those acquired since the adoption of the Constitution, as the Territory of Dakota was) the General Government exercises *sovereign powers—i. e.*, the "combined powers of the General and of a State government."

*1 Kent's Comm. 11th Ed., page 414, and 12th Ed. * p. 384.*

Pollard's Lessee v. *Hagan*, 3 How. 212, 223.

Cooley's Const Lim. 3d Ed., 525.

Hornbuckle v. *Toombs*, 18 Wall. 648, 655–6.

American Ins. Co. v. *Canter*, 1 Peters, 511, 542, 546.

Benner v. *Porter*, 9 How. 235.

United States v. *Gratiot*, 14 Peters, 537.

Sere v. *Pitot*, 6 Cranch, 336–7.

Cross v. *Harrison*, 16 How. 164, 193–4.

2 Story on Const., §§ 1324, 1325, 1328.

The power to "make all needful rules and regulations respecting the territory" of the United States, authorizes Congress to establish a local Territorial government.

McCulloch v. *Maryland*, 4 Wheat. on page 422, per MARSHALL, C. J.

2 Story on the Constitution, § *1325*.

The power of Congress to legislate for the District of Columbia (or a Territory) is not a power that Congress cannot delegate to a local municipal government, if it so elects.

Welch v. *Cook*, 7 Otto, 541.

Although the Federal Government has no "constitu-"tional capacity to exercise municipal jurisdiction, sov-"ereignty or eminent domain within the limits of a "State," except in the cases in which it is expressly granted, within a Territory the case is different, as there the General Government exercises sovereign powers, and this includes the right of *eminent domain*.

Pollard's Lessee v. *Hagan*, 3 How. 212–223.

Cooley's Constitutional Limitations, 3d ed., p. 525.

The sovereign power of Congress over the Territories authorizes it to confer upon courts established there by itself, or by the local Territorial government to which it has delegated the authority, the power to hear and determine controversies which the Constitution does not permit the Federal courts (*i. e.*, courts created by Congress within a State) to entertain.

Sere v. *Pitot*, 6 Cranch, 332, 336–7.

Hornbuckle v. *Toombs*, 18 Wall. 648, 655–6.

And although the Constitution expressly provides that "the judicial power of the United States *shall be* vested

" in one Supreme Court, and in such inferior courts as the " Congress may from time to time ordain and establish," and " that " the judges both of the Supreme and inferior courts " *shall hold their offices during good behavior*", yet Congress, in the exercise of its sovereign power over the Territories, may disregard this constitutional provision, as it does not apply to the " judicial power" exercised by the General Government in the Territories.

In a Territory the Federal Government may establish courts, or authorize the local Territorial Government there to establish courts which are not, in any sense, " constitutional courts," and which may be presided over by judges who do not " hold their offices during good behavior."

American Insurance Company v. *Canter*, 1 Peters, 511, 542, 546.
Benner v. *Porter*, 9 How. 235–242.
Clinton v. *Englebrecht*, 13 Wall. 434, 441–447.

A " direct tax," within the purview of the Constitution, is a tax upon real estate or other immovable property.

Veazie Bank v. *Fenno*, 8 Wall. 542–3.
Heylton v. *United States*, 3 Dallas, 171.

If Congress could only exercise the right of taxation defined in the Constitution, within the Territories or the District of Columbia, the property therein would, as a general thing, escape all taxation, as a " direct tax" is required by the Constitution to be apportioned among the several States according to the census, and all other taxes must " be uniform throughout the United States."

Constitution of United States, Act 1, Sec. 8.
Veazie Bank v. *Fenno*, 8 Wall. 541.

The constitutional provisions in reference to taxation have no application whatever to a tax imposed by or under

the authority of Congress in the District of Columbia or a Territory, for the purpose of maintaining a civil government therein; or, in other words, imposed as an incident of the right of sovereignty therein.

Welch v. *Cook*, 8 Otto, 541.

"Taxation is a sacred right, essential to the existence "of government—an incident of sovereignty."

Dobbins v. *Commissioners*, 16 Peters, 447.
Cooley on Taxation, pp. 3, 4.
Providence Bank v. *Billings*, 4 Peters, 561, 563.

But the power of taxation may be delegated to municipal corporations.

United States v. *New Orleans*, 8 Otto, 392–3.

Territorial governments are, "in substance and effect, municipal corporations on a large scale."

1 Dillon on Municipal Corporations, Sec. 18.

The organic act of Dakota provides "that the legisla- "tive power of the Territory shall extend to all *rightful* "*subjects of legislation*, consistent with the Constitution "of the United States and the provisions of this act; but "no law shall be passed interfering with the primary dis- "posal of the soil; no tax shall be imposed upon the "property of the United States; nor shall the lands or "other property of non-residents be taxed higher than "lands or other property of residents; nor shall any law "be passed impairing the rights of private property; nor "shall any discrimination be made in taxing different "kinds of property; but all property subject to taxation "shall be in proportion to the value of the property "taxed."

12 Stat. at Large, p. 241.

"A rightful subject of legislation is a subject which, "from the nature of things, the course of experience and "the genius of our Government, properly belongs to the "legislature to regulate and control as distinguished from "those subjects which properly pertain to the judicial and "executive departments of the Government."—*Per* DEADY, J., *in construing the organic act of Washington Territory, in Edwards* v. *Steamship Panama*, 1 Oregon R. 423.

A Territorial Legislature, under an organic act similar to that given Dakota, has authority to create private corporations.

Trustees of Vincennes University v. *State of Indiana*, 14 How. 269, 272–3.

State v. *New Orleans Navigation Company*, 11 Martin, 309.

Miners' Bank v. *Iowa*, 12 How. 1, 4, 6, 7 and 8.

Douglass v. *Bank*, 1 Mo. 24.

Cornell v. *Colorado Springs Co.*, 3 Col. 82, 89–91.

Including a railroad corporation invested with the right of *eminent domain*.

Swan v. *Williams*, 2 Mich. 427.

D. & S. Ry. Co. v. *D. C. Ry. Co.*, 2 Col. 673.

C. R. R. Co. v. *Sohns*, 1 Wash. Ter. R., N. S. 557.

Dakota, under its organic act, had authority to create local municipal corporations

County of Laramie v. *Albany County*, 2 Otto, 307.

Rogers v. *Burlington*, 3 Wall. 654, 662 and 663.

Riddick v. *Amelin*, 1 Mo. 5.

Kansas v. *Young*, 3 Kansas, 445.

Burnens v. *Mayor of Atchison*, 2 Kas. 454, 483–486.
Deitz v. *City of Central*, 1 Col. 323, 325, 326.

And invest them with the power to issue bonds in aid of the construction of a railroad entering the municipality.

Rogers v. *City of Burlington*, 3 Wall. 654, 662 and 663.
Barnes v. *Mayor of Atchinson*, 2 Kas. 454, 484, 486.
Packard v. *Board of County Com.*, 2 Col. 338.

Taxation for the purpose of paying bonds issued in aid of the construction of a railroad approaching or entering the Territory on which the tax is laid, is taxation for a "public purpose."

Rogers v. *Burlington*, 3 Wall. 663, 666.
Railroad Company v. *County of Otoe*, 16 Wall. 672, 673.
Olcott v. *Supervisors*, 16 Wall. 693, 698.
St. Joseph Township v. *Rogers*, 16 Wall. 662, 663.
Township of Pine Grove v. *Talcott*, 19 Wall. 676, 677.

See, also, as to the public character of railroad companies—

C., B. & Q. R. R. Co. v. *Iowa*, 4 Otto, 161.
Munn v. *Illinois*, 4 Otto, 125, 130.

II.

The act entitled "An act to enable organized counties and townships to vote aid to any railroad, and to "provide for the payment of the same," approved by the Governor of Dakota, April 21, 1871, was an act of the

Legislative Assembly of the Territory of Dakota. See—

Organic Act of Dakota, 12 Statutes at Large, 240, 241.

See, also, special findings Nos. 1 and 2, pages 18 and 19 of Record.

The term "*regular* sessions," in the organic act, implies that *extra* sessions may be called.

A statute must be so construed as to give every word some significance, if possible.

Platt v. *Union Pacific R. R. Co.*, 9 Otto, on pages 58 and 59, and cases there cited.

Sedgwick on Statutory and Constitutional Law, 200, and in note a.

Potter's Dwarris on Statutes, 175, note.

Decker v. *Hughes*, 68 Ill. 33, 41.

What is implied in a statute is as much a part of it as what is expressed.

Gelpcke v. *City of Dubuque*, 1 Wall. 220.

Township of Pine Grove v. *Talcott*, 19 Wall. on page 676.

Butz v. *Muscatine*, 8 Wall. p. 581.

United States v. *Babbit*, 1 Black. 61, and cases there cited.

The *proviso* to the appropriation bill approved March 3, 1869, did not amount to a repeal by implication of the *power* of the Legislative Assembly of Dakota to convene in extra session. It simply prevented the General Government from being charged with the expenses of any except regular biennial sessions. It was, at most, only *directory* and not *mandatory*, as to the right or power to hold sessions oftener.

Repeals by implication are not favored, and any construction involving it is rejected in favor of any other which the language will rationally bear.

Maxwell on Interpretation of Statutes, 134.

The Distilled Spirits, 11 Wall. on page 365.
United States v. *Walker*, 22 How. on page 311, and cases there cited.

It would be a great injustice to deprive the local Territorial Legislature of the right to convene in extra session when an emergency arose. A deprivation of that right "might have disarmed them of the very power of self-"preservation. An invasion or insurrection, or any crisis "demanding the most strenuous action, would (might) "have had to remain without preventive remedy till Con-"gress, if not in session, could be convened, or, when in "session, must have waited its possible procrastinated "aid."

Miners' Bank v. *Iowa*, 12 How. on page 8.

"All laws should receive a sensible construction. "General terms should be so limited in their application "as not to lead to injustice, oppression or any absurd "consequence. It will always, therefore, be presumed "that the Legislature intended exceptions to its language, "which would avoid results of this character. The reason "of the law in such cases should prevail over its letter."

United States v. *Kirby*, 7 Wall. on pages 486, 487.

A proviso "is to be construed in connection with the section of which it forms a part."

Savings Bank v. *United States*, 19 Wall. on page 236.
Minis v. *United States*, 15 Peters, on page 445.

Statutory regulations intended for the guide of public officers in the conduct of business, and designed to secure order, system and dispatch in proceedings, are generally *directory* and not *mandatory*.

French v. *Edwards*, 13 Wall. on p. 511.

Potter's Dwarris on Statutes, 221–226, in note and cases there cited.

Cooley's Constl. Lim., 3d ed. 74, 75, 78, and cases cited.

2 Dillon on Municipal Corporations, 2d Ed. Sec. 690.

The Legislative Assembly was only in session thirty-five days, at the regular session which convened December 5, 1871. The extra session lasted only four days. Hence both sessions did not consume the whole of the forty days allowed by the organic act.

Special findings Nos. 1 and 2, page 18 and 19 of Record.

The fact that the delegates from the Territories cannot vote in Congress, does not deprive Congress of the right to impose a tax upon the citizens of the Territories. Taxation can exist without representation.

Loughborough v. *Blake*, 5 Wheat. p. 324.

1 Story on the Constitution, Secs. 1010, 1011, 1012.

Congress recognized the act in question as an "*act passed by the Legislative Assembly of the Territory of Dakota*," and this amounted to a retroactive construction by Congress of the previous Congressional legislation in favor of the right of the members of the Territorial Legislature to convene in extra session. (See act of May 27, 1872; 17 Stat. at Large, 162–3. *Same in Record at pages 16–18.*)

"Retrospective laws which do not impair the obli-
"gation of contracts or partake of the character of *ex post*
"*facto* laws, are not condemned or forbidden by any part
"of the Constitution."

Satterlee v. *Matthewson*, 2 Peters, page 413.

Wilkinson v. *Leland*, 2 Peters, 627, 661.

Watson v. *Mercer*, 8 Peters, 88, 110.

Charles River Bridge v. *Warren Bridge*, 11 Peters, 421.

III.

THE ACT OF CONGRESS OF MAY 27, 1872 VALIDATES THE BONDS, EVEN THOUGH THE EXTRA SESSION WAS UNAUTHORIZED.

Charters of municipal corporations are subject to repeal or modification at the pleasure of the Legislature, which may in its discretion recall to itself and exercise the legislative powers granted to the municipality.

Cooley on Constitutional Limitations, 3d Ed. *192–3*, and cases cited; also on pages 378–380.

1 Dillon on Municipal Corporations, 2d Ed. *Sec. 38 and 168.*

United States v. *Railroad Company*, 17 Wall. 329, 331, 332.

Commissioners v. *Lucas*, 3 Otto, p. 114.

Town of Mount Pleasant v. *Beckwith*, decided at the present term, reported in 21 Albany L. Journal, 236–7.

Muncipal corporations created by a Territorial Legislature are governed by the same rules.

Laramie County v. *Albany County*, 2 Otto, 307, *a case relating to a municipal corporation created by the Territorial Legislature of Dakota, which was subsequently divided by the Legislature, without any provision being made in reference to the payment of $40,000 of existing indebtedness on the part of the county.*

Municipal corporations "are the auxiliaries of the "State in the important business of municipal rule, and "cannot have the least pretension to sustain their privi- "leges or their existence upon anything like a contract "between them and the Legislature of the State, because "there is not and cannot be any reciprocity of stipula-

"lation, and their objects and duties are utterly incom-
"patible with everything of the nature of contract."

Laramie County v. *Albany County*, 2 Otto, on page 311.

The officers of a municipal corporation "are nothing
"more than local agents of the State, and their powers
"may be revoked or enlarged, and their acts may be set
"aside or confirmed, at the pleasure of the paramount
"authority, so long as private rights are not thereby
"violated."

Laramie County v. *Albany County*, 2 Otto, on page 312, citing *Russell* v. *Reed*, 27 Penn. St. 170.

The Legislature "changes county sites and orders
"new roads to be opened and new bridges to be built at
"the expense of the counties, and no one, it is supposed,
"disputes the exercise of such powers by the Legisla-
"ture."

By the court in—

Laramie County v. *Albany County*, 2 Otto, on page 313, citing *Burns* v. *Clarion County*, 62 Penn. St. 425; *People* v. *Pinkney*, 32 N. Y. 393; *St. Louis* v. *Russell*, 9 Mo. 507.

See, also,

United States v. *Railroad Company*, 17 Wall. on page 331.

The Legislature of a State (when not limited or restrained by constitutional provisions) may authorize the officers of a municipal corporation to issue bonds and impose a tax to pay them, upon private property within the limits of a municipal corporation, in aid of a railroad which is to furnish a public improved highway for the citizens of the municipality, or for any other public pur-

pose without submitting the question to a popular vote at all, if it so elects.

Railroad Company v. *County of Otoe*, 16 Wall. 676, 677.
County of Callaway v. *Foster*, 3 Otto, 572.
St. Joseph Township v. *Rogers*, 16 Wall. 664.
County of Moultrie v. *Savings Bank*, 2 Otto, 632.
County of Schuyler v. *Thomas*, 8 Otto, 175.
Thompson v. *Lee County*, 3 Wall. 330.

The Legislature may appoint agents of its own, other than the county officers, to issue the bonds, if it so elects.

Sheboygan County v. *Parker*, 3 Wall. 93.

And the State Legislature can even impose such a burden upon the municipality, through its own agents directly, for and on behalf of the municipality, "without the assent or against the wish of the corporation or its citizens."

United States v. *Railroad Company*, 17 Wall. on page 332, citing, *arguendo*, *The Town of Gilford* v. *Board of Supervisors of Chenango County*, 3 Kernan, 143.

The Legislature may treat an unauthorized or illegal prior popular vote as an expression of the wishes of the municipality in reference to the issuing of such bonds, the same as though the vote had been authorized and legal at the time it was taken.

County of Leavenworth v. *Barnes*, 4 Otto, 70, 72, 73.
Railroad Company v. *County of Otoe*, 16 Wall. 667, 677.
St. Joseph Township v. *Rogers*, 16 Wall. 644, 664, 665.
Lee County v. *Rogers*, 7 Wall. 184, 187.
Thompson v. *Lee County*, 3 Wall. 327.

Omnis ratihabitio retro trahitur et mandato priori aequiparatur.

Hence, bonds that are illegal and void when issued, may be subsequently validated by the Legislature.

New Orleans v. *Clark*, 5 Otto, 644, 653–4.
Commissioners v. *Thayer*, 4 Otto, on pages 642–3.
City v. *Lamson*, 9 Wall. 478, 485.
Campbell v. *Kenosha*, 5 Wall. 194, 203.
Ritchie v. *Franklin County*, 22 Wall. 68, 76.
Beloit v. *Morgan*, 7 Wall. 623, 624 and cases there cited.
Cooley on Constitutional Limitations, *3d Ed. pp. 379, 380.*

If the extra session of the Dakota Legislature was unauthorized, and the act passed by it a nullity when passed, and up to the time of the approval of the curative act of Congress, yet after the curative act of Congress became a law, that certainly had the effect from that time, at least, to give the act of April 21, 1871, the force and virtue of a law, so far as it relates to these bonds.

An act, even of a foreign Legislature, may be adopted by a reference to it sufficiently plain to identify it.

Kendall v. *United States*, 12 Peters, on page 625.

The act of Congress of March 2, 1867 (14 Statutes at Large, 426), did not repeal or take away the power conferred upon the Territorial Legislature of Dakota by its organic act, to enact a general incorporation law under which railroad companies could organize. Congress itself has given this interpretation to it. Hence the "Dakota Southern Railroad Company" was a valid corporation, as organized under the general incorporation act of the Territory, passed January 6, 1868. (Laws of Dakota, 1867–8, pages 154, 199.)

17 Statutes at Large, page 390, act of June 10, 1872.

If the "Dakota Southern Railroad Company" was not a valid corporation, until the act of Congress of May 27, 1872, became a law, it certainly was after that. Congress declared it to be a "legal and valid corporation." Section 1 of act of May 27, 1872, page 25 of record in this case.

The "Dakota Southern Railroad Company" was a corporation *de facto* if not *de jure*, and Yankton County is estopped from questioning its corporate existence. (Section 382, Civil Code of Dakota, Laws of Dakota, 1870–1, page 74.)

Commissioner v. *Bolles*, 4 Otto, 104.
County of Leavenworth v. *Barnes*, 4 Otto, 72, 73.
Darlington v. *Le Clede County*, 1 Dillon C. C. 200.
County of Macon v. *Shores*, 7 Otto, 272.
Chubb v. *Upton*, 5 Otto, 667.

The act of Congress authorizing the railroad company to extend its road (subject to certain conditions) farther than it was to be "constructed and completed" when the vote was taken, does not invalidate the bonds nor furnish the county a sufficient reason for repudiating them.

1. Because the *proviso* to the act forbids the railroad company from so extending its road, if in so doing the railroad company would be "*constructing* or *completing* said railroad," not "in accordance with the *conditions* and *stipulations* under which the citizens of" Yankton County voted aid to said railroad.

In other words, the *proviso* is as broad as the grant of authority to extend the road.

The road, "*as organized*," was declared to be a valid corporation. The right to extend the road is subject to the limitations contained in the proviso.

See the act, pages 17–18 of Record.

2. The railroad has not in fact been extended westward. The county of Yankton is still its western terminus. And the eastern extension (which is all in the State of Iowa) had not only been projected, but was demanded by Yankton County from the railroad company, before the act of Congress was passed, under a penalty of $400,000 if the company neglected to do it.

See Record, pages 25, 26, 30.

3. The laws of Dakota in force when the vote was taken authorized such extensions of the road.

See Session Laws of Dakota for 1867–8, sec. 75, p. 180; sec. 115, p. 193; sec. 95, p. 188; and secs. 89 to 93.

Civil Code of Dakota, sec. 381, Laws 1870–1, p. 74.

The citizens of a municipal corporation, as well as other people, are bound to know the laws. If therefore, the subsequent alteration in the purposes or organization of a company, although radical, is one that was provided "for or contemplated by either the charter or general laws" of the Territory in force when the vote was taken, the citizens of the corporation must be presumed to have voted with the understanding that such a change might occur. They cannot, therefore, complain.

Nugent v. *Supervisors*, 19 Wall. 242, 248–253, and cases there cited.

Wilson v. *Salamanaca*, 9 Otto, 499.

County of Schuyler v. *Thomas*, 8 Otto, 174.

Town of East Lincoln v. *Davenport*, 4 Otto, 806.

County of Leavenworth v. *Clark*, 4 Otto, 70, 73.
Commissioners v. *Clark*, 4 Otto, 286.
County of Ray v. *Vansycle*, 6 Otto, 675, 688.
County of Scotland v. *Thomas*, 4 Otto, 682.
County of Henry v. *Nicolay*, 5 Otto, 619.
County of Callaway v. *Foster*, 3 Otto, 567.
Township of Empire v. *Darlington*, decided at the present term, and reported in Legal News for March 20, 1880, p. 226.

The act of Congress did not compel Yankton County to *accept* the paid-up certificates of stock required to be issued to it or tendered to it by the railroad company, and hence the county cannot complain that Congress *compelled* it to become a stockholder in the railroad company against its wish.

(*See the last clause of the act of May 27, 1872, page 17 of Record.*)

The duty enjoined on the railroad company to "issue to" the county a paid-up certificate of stock, was for the benefit of Yankton County, and the county could have waived the benefit if it so desired. A municipal corporation has the power to waive a benefit accruing to it, so as to estop itself from objecting that the benefit was not received.

See

County of Randolph v. *Post*, 3 Otto, on p. 513, and cases there cited.

The railroad company tendered the certificates of stock to the county, and the county accepted them. And it has never offered to surrender the same, but on the contrary has voted with and sued upon the stock. The county cannot, therefore, complain. See

Findings of Facts, No. 28, page 589; No. 24, page 55; No. 22, page 43; No. 14, page 34 of Record.

IV.

Counties in Dakota were authorized to extend aid to "any road" or "any enterprise designed for the benefit of the county," by the act of January 14, 1869, which was passed at a regular session of the Dakota Legislature, and the bonds in question are valid obligations against Yankton County, in the hands of innocent purchasers, by virtue of the authority conferred upon the county by the provisions of that act.

See Session Laws of Dakota for 1868–9, pages 168, 169.

Authority given to a municipal corporation to aid or construct "*any road*" is broad enough to include a *railroad*.

Riggs v. *Johnson County*, 6 Wall. 166.
City v. *West*, 7 Wall. 82, 87.

Railways, as a matter of usage, founded upon experience, are considered by the courts in the nature of improved highways.

St. Joseph Township v. *Rogers*, 16 Wall. on page 663.

See, also,

Olcott v. *Supervisors*, 16 Wall. 694.
Railroad Company v. *County of Otoe*, 16 Wall. on page 673.

Authority given to a municipal corporation "to borrow money for any public purpose," is sufficient to enable a corporation to issue bonds in aid of a railroad.

Rogers v. *Burlington*, 3 Wall. 654.

Grant of authority in these words, "as fully as any individual," has been held sufficient.

Seybert v. *Pittsburg*, 1 Wall. 272.

The expression in this statute, "whenever a majority of the people thereof shall be in favor of the proposition," simply means a majority voting at such election.

St. Joseph Township v. *Rogers*, 16 Wall. 644, on page 664.

See, also,

County of Cass v. *Johnson*, 5 Otto, 360.

The 21st section of this act did not require the County Commissioners to submit to the people a separate proposition as to laying a tax, when the proposition submitted was to donate time *bonds*, not money.

(See section 24 of the act, page 172, Session Laws Dakota, 1868–9.)

Gelpcke v. *Dubuque*, 1 Wall. 221, 223.

The County Commissioners were the proper officers to pass upon the question of the regularity of the proceedings.

Session Laws of Dakota, 1868–9, section 16, page 171; See, also, sections 14, 15, 9, 18, 29 and 36 of the same act.

An appeal could be taken to the District Court from their decisions.

See sections 31, 35 of same act.

The omission to take an appeal from the decisions of the County Board in favor of issuing the bonds, or to obtain an injunction to restrain the bonds from being issued (if any illegality or irregularity was committed by the County Board in issuing them), was *gross laches*, and bars the county from setting up any defenses on the ground of *such* irregularity against the appellant—an innocent purchaser of the bonds.

Orleans v. *Platt*, 9 Otto, 681, 683, and cases there cited

Bissell v. *City of Jeffersonville*, 24 How. 299.

Rogers v. *Burlington*, 3 Wall. on p. 667.

As the county received a full and adequate consideration for the bonds,—all that it stipulated for—"common honesty demands that a debt thus incurred should be paid."

Commissioners v. *Bolles*, 4 Otto, 110.

BRIEF AND ARGUMENT.

I.

THE FEDERAL GOVERNMENT, WITHIN THE LIMITS OF AN ORGANIZED STATE, EXERCISES ONLY THOSE POWERS GRANTED TO IT BY THE CONSTITUTION; ALL OTHERS ARE RESERVED TO THE STATE OR THE PEOPLE. NOT SO IN THE TERRITORIES. THERE THE GENERAL GOVERNMENT EXERCISES SOVEREIGN POWERS; THAT IS, IT EXERCISES THERE THE COMBINED POWERS OF THE GENERAL AND OF A STATE GOVERNMENT, SO FAR AT LEAST AS RELATES TO THE POWER OF CREATING PRIVATE OR MUNICIPAL CORPORATIONS IN SUCH TERRITORIES, AND IMPOSING TAXES UPON PROPERTY WITHIN SUCH TERRITORIES, INCIDENT TO THE RIGHT OF SOVEREIGNTY THEREIN. AND THESE POWERS TO CREATE CORPORATIONS AND IMPOSE TAXES WERE CONFERRED UPON THE TERRITORIAL LEGISLATURE OF DAKOTA BY THE ORGANIC ACT WHICH CREATED A LOCAL GOVERNMENT FOR THAT TERRITORY.

One of the judges for the Supreme Court of Dakota held, in passing upon the validity of these bonds, "that "neither Congress nor the Territorial Legislature, nor "both combined, could authorize the County of Yank-"ton to make the donation or subscription to the capi-"tal stock of a railroad."

We do not know what positions will be taken by counsel on the other side, in arguing this case, and hence we have thought it best, in this brief, to meet every point that has ever been raised against the validity of these bonds.

We respectfully call the attention of the court to the following authorities in support of the above proposition, as stated by us :

In *Kent's Commentaries, vol. 1, p. 414, 11th ed.*, that able author says :

" With respect to the vast territories belonging to " the United States, Congress has assumed to exercise " over them supreme powers of sovereignty. Exclusive " and unlimited power of legislation is given to Congress " by the Constitution and sanctioned by judicial decis- " ions. "

Judge STORY, in his *Commentaries on the Constitution*, in speaking of the power of Congress over the Territories, says (vol. 2, secs. 1,324, 1,325, 1,328) :

§ 1324. " As the General Government possesses the " right to acquire territory, either by conquest or by treaty, " it would seem to follow, as an inevitable consequence, that " it possesses the power to govern what it has so acquired. " The territory does not, when so acquired, become en- " titled to self-government, and it is not subject to the " jurisdiction of any State. It must, consequently, be " under the dominion and jurisdiction of the Union, or it " would be without any government at all. In cases of " conquest, the usage of the world is, if a nation is not " wholly subdued, to consider the conquered territory as " merely held by military occupation until its fate shall be " determined by a treaty of peace. But during this in- " termediate period it is exclusively subject to the " government of the conqueror. In case of confirmation " or cession by treaty, the acquisition becomes firm and " stable, and the ceded territory becomes a part of the " nation, to which it is annexed, either on terms stipulated " in the treaty or on such as its new master shall impose. " The relations of the inhabitants with each other do not " change, but their relations with their former sovereign are " dissolved, and new relations are created between them " and their new sovereign. The act transferring the

" country transfers the allegiance of its inhabitants. But " the general laws, not strictly political, remain as they " were until altered by the new sovereign. If the treaty " stipulates that they shall enjoy the privileges, rights, " and immunities of citizens of the United States, the " treaty, as a part of the law of the land, becomes " obligatory in these respects.

" Whether the same effects would result from the " mere fact of their becoming inhabitants and citizens by " the cession, without any express stipulation, may " deserve inquiry if the question should ever occur. But " they do not participate in political power, or can they " share in the powers of the General Government until " they become a State, and are admitted into the Union " as such. Until that period the Territory remains subject " to be governed in such manner as Congress shall " direct, under the clause of the Constitution now under " consideration."

§1325. " No one has ever doubted the authority of " Congress to erect Territorial governments within the ter- " ritory of the United States, under the general language " of the clause, 'to make all needful rules and regulations.' " Indeed, with the ordinance of 1787 in the very view of " the framers, as well as the people of the States, it is im- " possible to doubt tnat such a power was deemed indis- " pensable to the purposes of the cessions made by the " States. So that, notwithstanding the generality of the " objection (already examined), that Congress has no " power to erect corporations, and that in the convention " the power was refused, we see that the very power is an " incident to that of regulating the territory of the United " States; that is, it is an appropriate means of carrying " the power into effect.

" What shall be the form of government established " in the Territories depends exclusively upon the discre- " tion of Congress. Having a right to erect a Territorial " Government, they may confer on it such powers, legisla-

" tive, judicial and executive, as they may deem best. " They may confer upon it general legislative powers, " subject only to the laws and Constitution of the United " States. If the power to create courts is given to the " Territorial Legislature, those courts are to be deemed " strictly Territorial, and in no just sense constitutional " courts, in which the judicial power conferred by the " Constitution can be deposited. They are incapable of " receiving it. They are legislative courts, created in " virtue of the general right of sovereignty in the Govern- " ment, or in virtue of that clause which enables Congress " to make all needful rules and regulations respecting the " Territories of the United States. The power is not con- " fined to the Territories of the United States, but ex- " tends to 'other property belonging to the United States;' " so that it may be applied to the due regulation of all " other personal and real property rightfully belonging to " the United States. And so it has been constantly " understood and acted upon."

In *McCulloch* v. *Maryland*, 4 Wheat., on page 422, Ch. Justice MARSHALL uses this language:

" The power to make all needful rules and regula- " tions respecting the territory or other property " belonging to the United States is not more comprehen- " sive than the power to 'make all laws which shall be " necessary and proper for carrying into execution' the " powers of the Government. Yet all admit the consti- " tutionality of a Territorial government, which is a cor- " porate body."

In *United States* v. *Gratiot*, 14 Peters, 537, this court, in construing this same clause in the Constitution, authorizing Congress to " make all needful rules and regulations " respecting the Territory or other property belonging to " the United States," considered that it vested sovereign power in Congress to legislate for the Territories, saying: " The term Territory, as here used (*i. e.*, in Art. 4, Sec. " 3 of the Constitution), is merely descriptive of one kind

" of property, etc., and is equivalent to the word lands. " 'And Congress has the same power over it as over any " other property belonging to the United States;' and " this power is vested in Congress without limitation; and " has been considered the foundation upon which the Ter- " ritorial governments rest."

See, also, *Cross* v. *Harrison*, 16 How. 164, 193–195, in which this court held that the Federal Government had, as sovereign, the right of maintaining a civil government in California, before she was admitted as a State into the Union, after she, or the port of San Francisco, " had been conquered by the arms of the United States " in 1846, and referred with approval to some of the prior cases recognizing the sovereign power of Congress over the Territories, whether they were acquired since the adoption of the Constitution or before.

In *Miners' Bank* v. *Iowa*, 12 How., pp. 1, 4, 6, 7 and 8, this court recognized the sovereign power of Congress over Territories acquired since the adoption of the Constitution, and that this sovereign power of Congress authorized it to establish in such a Territory a local government, and invest it with " general legislative power;" and also held that an authority exercised under an act passed by the Territorial Legislature of Wisconsin (which Territorial Legislature was not only created by Congress, but its acts were required to be submitted to Congress, and if disapproved by Congress, then they were to be null and void), was not " an authority exercised under the United States," although the act in question was disproved and annulled in certain particulars by Congress, and approved as to the rest. And that where the validity of such a statute was drawn in question, it was not drawing in question the validity of a statute of the United States, or of any right, privilege or immunity claimed under the Constitution or statutes of the United States.

The court say, page 4: "By what may be termed "the organic laws creating the governments of both the "Territories above mentioned (Iowa and Wisconsin), it "will be seen that those governments were vested with "general legislative power, and were subjected to no "emunerated or specific limitations of that general power, "save in certain exceptions applicable to the lands or "other property of the United States, and to the right on "the part of those governments in exercising the power "of taxation, to discriminate between the property of resi- "dents and non-residents. The language of the provision "here referred to is identical in the laws establishing each of "these Territories, and is in the following words: 'That "'the legislative power of the Territory shall extend to "'all rightful subjects of legislation, but no laws shall be "'passed interfering with the primary disposal of the "'soil. No tax shall be imposed upon the property of "'the United States, nor shall the lands or other property "'of non-residents be taxed higher than the lands of "'residents, * * * * * *

"The alleged wrong which the court are called on to "redress is not an act of State power at all, it is an act of "the Territorial Government of Iowa, by which was re- "pealed an act of the preceding Territorial Government of "Wisconsin, consequently the decision of the court below "asserted no State act or power in opposition to the Con- "stitution, treaties or laws, or to a commissioner or "authority of or under the United States, and pre- "sents, therefore, no ground of jurisdiction here, "either as derived from the language of the statute, or "from any construction heretofore given of it.

* * * * * * *

"It seems to us that the control of these Territorial "governments properly appertains to that branch of the "Government which creates and can change or modify them "to meet its views of public policy, viz: The Congress of "the United States.

"That control certainly has not been vested in this "court, either in mode or substance, by the 25th "section of the *Judiciary Act*.

"It has been argued in this case, that as Congress, in "creating the Territorial governments of Wisconsin and "Iowa, reserved to themselves the power of disapproving, "and thereby annulling the acts of those governments, "and had, in the exercise of that power, stricken out sev- "eral of the provisions of the charter of the Bank of "Dubuque, enacted by the Legislature of Wisconsin, as- "senting to the residue, that, therefore, the charter of "this bank should be regarded as an act of Congress, "rather than of the Territorial Government; and, conse- "quently, the decision of the State court in favor of "the repealing law of Iowa must be held to be one in "which was drawn in question, and overruled the validity "of a statute of, or an authority exercised under the "United States, and as a decision also against a right, "title, or privilege set up under a statute of the United "States.

"The fallacy of this argument is easily detected. "Congress, in creating the Territorial governments, and in "conferring upon them powers of general legislation, did "not, from obvious principles of policy and necessity, or- "dain a suspension of all acts proceeding from those powers, "until expressly sanctioned by themselves, whilst for con- "siderations, equally strong they reserved the power of "disapproving or annulling such acts of Territorial legisla- "tion as might be deemed detrimental. A different system "of procedure would have been fatal to all practical im- "provements in those Territories, however urgently called "for; nay, might have disarmed them of the very power of "self-preservation. An invasion or insurrection, or any "other crisis demanding the most strenuous action, would "have to remain without preventive or remedy till Con- "gress, if not in session, could be convened, or when in "session, must have waited its possibly procrastinated aid.

"The argument would render, also, the acts of the Ter-
" ritorial governments, even the most wholesome and neces-
" sary, and though indispensably carried to the extreme of
" authority, obnoxious to the charge of usurpation or
" criminality. The reverse of this argument, while it is
" accordant with the investiture of general legislative power
" in the Territorial governments, places them in the posi-
" tion of usefulness and advantage towards those they were
" bound to foster, and subjects them at the same time to
" proper restraint from their superior. The charter of the
" Bank of Dubuque, enacted in all its details and powers
" ever possessed by it (and according to which it was, in
" fact, organized), by the Legislature of Wisconsin, must
" be looked upon as the creature of that Legislature. To
" regard it as we are urged to do by the argument for the
" plaintiff in error, would constitute it rather a bank of the
" United States, situated without the United States, and
" operating within the Territroy of Wisconsin, now the
" State of Iowa, independently of the power or local
" policy of that State, and beyond the reach of its facul-
" ties or obligations to be exerted for its own citizens."

The organic act of Dakota is similar to the organic acts of Wisconsin and Iowa, quoted in the foregoing opinion. See

12 Statutes at Large, p. 241.

In *American Ins. Co.* v. *Canter*, 1 Peters, 511, 542, 546, which is a leading case upon the power of Congress over the Territories, this court held a Territorial Legislature had authority to create a court and invest it with admiralty jurisdiction, although the court so constituted could not be created within a State.

Chief Justice MARSHALL, in delivering the unanimous opinion of the court, discusses the power of the Federal Government over the Territories very fully, and we therefore take the liberty of quoting quite extensively from his opinion.

He says, page 542: "The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties, consequently that government possesses the power of acquiring territory either by conquest or by treaty."

The Judge then refers to the treaty of cession by which Spain ceded Florida to the United States, and says: "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation; they do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution, which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

"Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States.

"The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it Congress in 1822 passed an act for the establishment of a Territorial Government in Florida, and on the third of March, 1823, passed another act to amend the act of 1822. Under this act the Territorial Legislature enacted the law now under consideration.

"The fifth section of the act of 1823 creates a Territorial Legislature *which shall have legislative power over all rightful objects of legislation*. But no law shall be

" valid which is inconsistent with the laws and Constitution " of the United States."

* * * * * * *

(Page 546.) " It has been contended that by the Con- " stitution the judicial power of the United States extends " to all cases of admiralty and maratime jurisdiction, and " that the whole of this judicial power must be vested 'in " one Supreme Court, and in such inferior courts as Con- " gress shall from time to time ordain and establish.'"

" Hence it has been argued that Congress cannot vest " admiralty jurisdiction in courts created by the Territorial " Legislature. We have only to pursue this subject one " step further, to perceive that this provision of the Consti- " tution does not apply to it. The next sentence declares " that 'the judges both of the Supreme and inferior courts " shall hold their offices during good behavior.' The " judges of the Superior Courts of Florida hold their " offices for four years. These courts, then, are " not constitutional courts, in which the judicial " power conferred by the Constitution on the General " Government can be deposited. They are incapable " of receiving it. They are legislative courts created in " virtue of the general right of sovereignty which exists " in the Government, or in virtue of that clause which en- " ables Congress to make all needful rules and regulations " respecting the territory belonging to the United States. " The jurisdiction with which they are invested is not a part " of that judicial power which is defined in the third article " of the Constitution, but is conferred by Congress in the " execution of those general powers which that body pos- " sesses over the Territories of the United States. Al- " though admiralty jurisdiction can be exercised in the " States in those courts only which are established in pur- " suance of the third article of the Constitution, the same " limitation does not extend to the Territories. *In legis-* " *lating for them, Congress exercises the combined powers of* " *the General and of a State government.*"

It seems to us, that this last case completely overthrows the argument which was very strongly urged by counsel upon the Supreme Court of Dakota, and which seems to have very largely influenced one of the judges, to the effect that the Federal Government was one of enumerated powers; and hence whilst a State government could impose a tax upon private property to aid in the construction of a railroad, because it represented absolute sovereign power, except as such power was *limited and restrained* by the State and Federal Constitution, the Federal Government could not exercise such a power, for the reason that such a power cannot (as the counsel claimed) be found among the enumerated powers delegated to the General Government by the Federal Constitution.

If we admit that Congress does not possess the power to impose a tax upon private property *within a State*, to aid a local public improvement, still the principle established by the above case, and others decided by this court, prevents that construction of the powers of Congress from operating upon legislation for the Territories.

The above case goes to the extent of holding that the Federal Government has the right to exercise powers within a Territory which, if exercised within a State, would be not only outside of the enumerated powers delegated to the General Government, but beside that would be in plain *violation* of the conditions attached by the Constitution to the grant of authority to the Federal Government.

The Constitution enumerates "judicial power" as one of the powers delegated. But the same article expressly provides that "the judicial power of the United States "*shall be vested* in one Supreme Court and in such infe- "rior courts as the Congress may from time to time or- "dain and establish. The judges, both of the Supreme "and inferior courts, *shall hold their offices during good* "*behavior*."

Yet this court held in the above case that Congress had the right, and so had the Territorial Legislature, exercising the powers conferred upon it by the Federal Government, to "ordain and establish" a court, and invest it with "judicial power," although the judge did *not* hold his office "during good behavior."

So in *Benner* v. *Porter*, 9 How. 235, this court held that the Territorial courts organized under the organic act of the Territory of Florida were not constitutional courts, but were courts which derived their existence from the plenary power of Congress over the Territories; and therefore, when Florida was admitted as a State, that, *ipso facto*, divested the Territorial courts therein of all jurisdiction of Federal causes. The court say, page 242:

"After the unconditional admission of the Territory "into the Union as a State on the third of March, 1845, "with her Constitution and complete organization of the "government under it, by which the authority of the "State was established throughout her limits, it is difficult "to see upon what ground it can be maintained that any "portion of the Territorial Government or jurisdiction "remained still in force.

"The distinction between the Federal and State "jurisdictions, under the Constitution of the United "States, has no foundation in these Territorial governments; and consequently, no such distinction exists, "either in respect to the jurisdiction of their courts, or "the subjects submitted to their cognizance. *They are "legislative governments, and their courts legislative "courts. Congress, in the exercise of its powers in the "organization and government of the Territories, combining the powers of both the Federal and State authorities.* "There is but one system of government, or of laws "operating within their limits, as neither is subject to the "constitutional provisions in respect to State and Federal "jurisdiction.

"They are not organized under the Constitution, nor "subject to its complex distribution of the powers of "government, as the organic law; but are the creations, "exclusively, of the legislative department, and subject "to its supervision and control. Whether or not there "are provisions in that instrument which extend to and "act upon these Territorial governments, it is not now "material to examine. We are speaking here of those "provisions that refer particularly to the distinction "between Federal and State jurisdiction. We think it "clear, therefore, that on the unconditional admission of "Florida into the Union as a State, on the 3d of March, "1845, the Territorial government was displaced, abro-"gated, every part of it; and that no power of jurisdic-"tion existed within her limits, except that derived from "the State authority, and that by force and operation of "the Federal Constitution and laws of Congress; and, "especially, no jurisdiction in Federal cases until Con-"gress interfered and extended the judicial tribunals of "the Union over it. The only pretext for a different con-"clusion is, that matters of exclusive Federal jurisdiction "within the territory which, under our system, did not "and could not pass under the State authority, still re-"mained; and that with it, to that extent, and for the "purposes of Federal jurisdiction, the Territorial organi-"zation continued. But, in the view we have already "presented, and which need not be repeated, no such "distinction existed in the Territorial government. Mat-"ters of this description had been blended together with "those belonging to State jurisdiction, and were incor-"porated into, and became part and parcel of, the same "system. The Federal causes of action were subject to "the same tribunals as others, and to the same remedies, "including writs of error and appeals to the Appellate "Court of the Territory, and through which, alone, cases "could be brought up for revision to the Supreme Court "of the United States. This Appellate Court consisted

" of the judges of Superior Courts of the several judicial " districts.

" The position taken in support of the jurisdiction " assumes that the admission of the State, and consequent " transfer of all actions and causes of action belonging to " the State authorities, had the effect, not only to separate " the Federal from the State subjects of jurisdiction, but " also to remodel the judicial system of the Territory " itself, and adapt its jurisdiction to the trial of Federal " causes,—assumptions that need only to be stated to carry " with them their refutation. And, besides, were this " admitted, and we could suppose that the jurisdiction of " the courts was left untouched, as it respected the Federal " cases pending or accruing, nothing would be gained in " the argument in favor of its validity. The admission of " the State into the Union brought the Territory under the " full and complete operation of the Federal Constitution, " *and the judicial power of the Union could be exercised* " *only in conformity to the provisions of that instrument.* " By art. 3, sec. 1, the judicial power of the Union " shall be vested in one Supreme Court, and in such " inferior courts as Congress may, from time to time, " ordain and establish. The judges, both of the Supreme " and inferior courts shall hold their offices during good " behavior. Congress must not only ordain and estab- " lish inferior courts within a State, and prescribe their " jurisdiction, but the judges appointed to administer " them must possess the constitutional tenure of office " before they can become invested with any portion of the " judicial power of the Union. There is no exception to " this rule in the Constitution. *The Territorial courts,* " *therefore, were not courts in which the judicial power* " *conferred by the Constitution on the Federal Government* " *could be deposited.* They were incapable of receiving it, " as the tenure of the incumbents was but for four years. (*1 Peters, p. 546.*) Neither were they organized by Con- " gress under the Constitution, as they were invested with

" powers and jurisdiction which that body were incapable " of conferring upon a court within the limits of a State."

In *Clinton* v. *Englebrecht*, 13 Wall. 434 (decided in 1871) this court held that the Territorial Legislature of Utah had the right to prescribe the manner of summoning jurors for the Territorial courts, and hence a jury summoned under the acts of Congress defining the manner of summoning jurors for United States courts, and contrary to the act of the Territorial Legislature, was wrong, and a judgment upon their verdict could not be sustained.

On page 441 the court say: "The theory upon " which the various governments for portions of the " territory of the United States have been organized, has " ever been that of leaving to the inhabitants all the " powers of self-government consistent with the suprem- " acy and supervision of national authority, and with " certain fundamental principles established by Congress."

The Chief Justice then refers to the ordinance of 1787, and in speaking of the powers thereby conferred upon the Territorial Legislature, says, on page 442:

" This Legislature, subject to the negative of the " Governor and certain fundamental principles and pro- " visions embodied in the articles of compact, was clothed " *with the full power of legislation for the Territory*."

After referring to the organic acts of various Territories organized since then, the learned judge, on pages 443–4, observes: "In all the Territories full power was " given to the Legislature over all ordinary subjects of " legislation. The terms in which it was granted were " various, but the import was the same in all." • •

" In 1836 the Territory of Wisconsin was organized " under an act which seems to have received full consider- " ation, and from which all subsequent acts for the organ- " ization of Territories have been copied, with few and in- " considerable variations. Except those in the Kansas and "Nebraska acts in relation to slavery, and some others

" growing out of local circumstances, they all contained the " same provisions in regard to the legislature and the " legislative authority, and to the judiciary and the judicial " authority, as the act organizing the Territory of Utah. " In no one of them is there any provision in relation to " jurors.

"The language of the section conferring the legislative "authority in each of these acts is this:

" The legislative power of said Territory shall extend " to all rightful subjects of legislation, consistent with the " Constitution of the United States and the provisions of " this act; but no law shall be passed interfering with the " primary disposal of the soil. No tax shall be imposed " upon the property of the United States, nor shall the " lands or other property of non-residents be taxed higher " than the lands or other property of residents."

" As there is no provision relating to the selection of " jurors in the Constitution, or the organic act, it cannot " be said that any legislation upon this subject is incon- " sistent with either. The method of procuring jurors for " the trial of cases is, therefore, a rightful subject of leg- " islation, and the whole matter of selecting, impaneling " and summoning jurors is left to the Territorial Legisla- " ture."

* * * * * * *

P. 447: " The judges of the Supreme Court of the Ter- " ritory are appointed by the President, under the act of " Congress, but this does not make the courts; they are au- " thorized to hold courts of the United States. This was " decided long since in *The American Insurance Company* " v. *Canter*, and in the late case of *Benner* v. *Porter*; there " is nothing in the Constitution which would prevent Con- " gress from conferring the jurisdiction which they exercise, " if the judges were elected by the people of the Territory " and commissioned by the Governor. They might be " clothed with same authority to decide all cases arising

" under the Constitution and laws of the United States, " subject to the same revision. Indeed, it can hardly be " supposed that the earliest Territorial courts did not de- " cide such questions, although there was no express pro- " vision to that effect, as we have already seen, until a " comparatively recent period. There is no Supreme " Court of the United States, nor is there any District " Court of the United States, in the sense of the Consti- " tution, in the Territory of Utah. The judges are not " appointed for the same terms, nor is the jurisdiction " which they exercise part of the judicial power conferred " by the Constitution or the General Government. The " courts are the legislative courts of the Territory, created " in virtue of the clause which authorizes Congress to " make all needful rules and regulations respecting the " Territories belonging to the United States."

In *Sere* v. *Pitot*, 6 Cranch, 332, 336–7, decided in 1810, it was held that Territorial courts possessed a larger jurisdiction than Congress had the power, under the Constitution to confer upon courts established within an organized State. Chief Justice MARSHALL, in that case, in delivering the opinion of the court, laid down very clearly the plenary power of the Federal Government over the Territories

He said, pages 336–7: " The power of governing " and of legislating for a Territory is the inevitable conse- " quence of the right to acquire and to hold territory. " Could this position be contested? The Constitution of the " United States declares that 'Congress shall have power to " 'dispose of and make all needful rules and regulations " 'respecting the territory or other property belonging to " 'the United States.' Accordingly, we find Congress " possessing and exercising the absolute and undisputed " power of governing and legislating for the Territory of " Orleans. Congress has given them a legislative, an " executive, and a judiciary, with such powers as it has

"been their will to assign to those departments respect-
"ively. The court possesses the same jurisdiction which
"was possessed by the court of Kentucky. In the court
"of Kentucky, a citizen of Kentucky may sue or be
"sued. But it is said that this privilege is not imparted
"to a citizen of Orleans, because he is not a citizen of a
"State. But this objection is founded on the idea that
"the Constitution restrains Congress from giving the court
"of the Territory, jurisdiction over a case brought by or
"against a citizen of the Territory. This idea is most
"clearly not to be sustained; and, of consequence, that
"court must be considered as having such jurisdiction as
"Congress intended to give it."

In *Hornbuckle* v. *Tooms*, 18 Wall. 648, 655, 656, decided in 1873, this court said: "Whenever Congress has
"pretended to organize a government for any of the Ter-
"ritories, it has merely instituted a general system of
"courts therefor, and has committed to the Territorial As-
"sembly full power, subject to a few specified or implied
"conditions, of supplying all details of legislation neces-
"sary to put the system into operation, even to the de-
"fining of the jurisdiction of the several courts. As a gen-
"eral thing, subject to the general scheme of local gov-
"ernment chalked out by the organic act, and such special
"provisions as are contained therein, the local Legislature
"has been intrusted with the enactment of the entire sys-
"tem of municipal law, subject also, however, to the right
"of Congress to revise, alter and revoke, at its discretion.
"The powers thus exercised by the Territorial Legislature
"are nearly as extensive as those exercised by any State
"Legislature, and the jurisdiction of the Territorial courts
"is collectively coextensive with and correspondent to
"that of the State courts, a very different jurisdiction
"from that exercised by the Circuit and District Courts
"of the United States. In fine, the Territorial, like the
"State courts are vested with plenary municipal jurisdic-
"tion."

A logical sequence from the foregoing decisions, it seems to us, is that the limitations imposed upon Congress by the Constitution, as to the exercise of the power of taxation, (*e. g.*, "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration,") do not apply to legislation for the *government* of the Territories, or legislation for the purpose of making "needful rules and regulations respecting" the Territories.

If the constitutional limitations upon the *judicial* power granted to the Federal Government do not apply to the exercise of judicial power in a Territory, because the right to establish a government in, or to make "needful rules and regulations" for a Territory, implies and carries with it a right to exercise *judicial* power there, independent of *the judicial* power defined and limited in the Constitution, then the same argument applies with still greater force to the power of taxation in a Territory.

If the right to impose taxes in a Territory must come from the right of taxation which is defined and limited in the Constitution, then no tax whatever upon real estate in the Territories can be imposed unless Congress sees fit to impose another "direct tax" upon the whole Union.

Up to this time Congress has only imposed four direct taxes, viz., in 1798, 1813, 1815 and 1861. (See history of same in *Veazie Bank* v. *Fenno*, 8 Wall. 542-543.)

And taxes imposed upon movable property in the Territories could not be made, unless a similar tax was imposed on all other movable property in the United States, so as to conform to the constitutional requirement of uniformity throughout the United States.

Veazie Bank v. *Fenno*, 8 Wall. 541.

Hence it would follow that the citizens of the Territories would entirely escape taxation. The roads, bridges, jails, court houses, asylums, and other necessary local public improvements, would have to be con-

structed by voluntary contributions, or else the General Government would have to do it from the national revenues.

Under this rule the Government would have to defray the whole expense of all the local municipal governments in the Territories, or else they would have to be maintained by voluntary contributions.

We submit that the right to impose a tax upon property within a Territory to build a local court house exists in Congress (or a local Territorial government organized under an act of Congress), if Congress (or a local Territorial government organized under an act of Congress) possess the right to authorize judicial power to be exercised in such a court house, by a judge who holds his office for four years, and not "during good behavior."

If the right of taxation exists at all, independent of the power of taxation, which is defined and limited in the Constitution, then the whole of the argument on the other side is gone.

Then it is admitted that a right of taxation exists outside of that which Congress possesses over property situated within a State.

No limit can be found to the right to exercise *this* power of taxation in the Territories, except that it must be for a public purpose, and that purpose one which is local to the Territory, or in other words, affects the Government of the Territory, or is included in the "needful rules and regulations" which Congress can enact for the Territories.

In *Welch* v. *Cook*, 7 Otto, 541, this court held that a tax imposed by Congress upon real estate within the District of Columbia, was a legal and valid tax, although it was not laid as required by the provisions of article 1, section 8 of the Constitution, in reference to direct taxes.

And in the same case this court thus summarily disposed of the objection that the legislative power of Con-

gress over the District could not be delegated to a subordinate District Government. (Page 541.)

"It is not open to reasonable doubt that Congress "had power to invest, and did invest the District Govern- "ment with legislative authority, or that the act of the "Legislative Assembly of June 26, 1878, was within that "authority. We shall, therefore, consider the question "as if that act exempting manufacturing property from "taxation had been passed directly by Congress."

It is claimed, that because the delegate to Congress from Dakota cannot vote upon the passage of a bill, even though the bill is intended specially for the Territory which he represents; therefore, Congress cannot impose a tax upon the citizens of the Territory. That taxation and representation are inseparable. And as these railroad aid bonds must be paid, if at all, from money raised by taxation, the power to issue them cannot exist. But we submit that this argument cannot be sustained, as this court has expressly decided that taxation can exist uuder our Government without representation.

In *Loughbrough* v. *Blake*, 5 Wheat. 317, the power of Congress to impose a direct tax on the District of Columbia was, by counsel, denied; and in reply to the objection against the taxation, founded upon the fact that the District was not represented, and therefore could not be taxed, this court said, through Chief Justice MARSHALL, page 324:

"If the general language of the Constitution should "be confined to the States, still the 16th paragraph of the "8th section gives to Congress the power of exercising "'exclusive legislation in all cases whatsoever within "this District.' On the extent of these terms, according "to the common understanding of mankind, there can be "no difference of opinion; but it is contended, that they "must be limited by that great principle which was

" asserted in our Revolution, that representation is in-
" separable from taxation.

" The difference between requiring a continent with
" an immense population to submit to be taxed by a gov-
" ernment having no common interest with it, separated
" from it by a vast ocean, restrained by no principle of
" apportionment, and associated with it by no common
" feelings; and permitting the representatives of the
" American people, under the restrictions of our Constitu-
" tion, to tax a part of the society, which is either in a
" state of infancy, advancing to manhood, looking forward
" to complete equality so soon as that state of manhood
" shall be attained, as is the case with the Territories; or
" which has voluntarily relinquished the right of repre-
" sentation, and has adopted the whole body of Congress
" for its legitimate government, as is the case with the Dis-
" trict, is too obvious not to present itself to the minds of
" all. Although in theory it might be more congenial to
" the spirit of our institutions to admit a representative
" from the District, it may be doubted whether its interests
" would be rendered thereby the more secure; and cer-
" tainly the Constitution does not consider this want of a
" representative in Congress as exempting it from equal
" taxation.

" If it were true that, according to the spirit of our
" Constitution, the power of taxation must be limited by
" the right of representation, whence is derived the right
" to lay and collect duties, imposts and excises within the
" District? If the principles of liberty and of our Consti-
" tution forbid the raising of revenues from those who are
" not represented, do not these principles forbid the raising
" it by duties, imposts and excises, as well as by a direct
" tax? If the principles of our Revolution give a rule
" applicable to this case, we can not have forgotten that
" neither the stamp act nor the duty on tea were direct
" taxes. Yet it is admitted that the Constitution not only

" allows, but enjoins the Government to extend the ordi-
" nary revenue system to this district."

See, also, *1 Story on the Constitution*, §§ *1010*, *1011*, *1012* where the above language of Chief Justice MARSHALL is adopted by the able commentator on the Constitution.

In *Pollard's Lessee* v. *Hogan*, 3 How. 212, 223, this court held that the sovereign power of the Federal Government over Alabama as a Territory, included the right of eminent domain, but denied this right of eminent domain to the Federal Government after Alabama became a State.

On page 223 the court says:

" The right which belongs to the society, or to the
" sovereign, of disposing, in case of necessity, and for the
" public safety, of all the wealth contained in the State,
" is called the *eminent domain*. It is evident that this
" right is, in certain cases necessary to him who governs,
" and is, consequently, a part of the empire, or sovereign
" power. *Vat. Law of Nations, Section 244.* * *
" The United States have no constitutional capacity to
" exercise municipal jurisdiction, sovereignty, or eminent
" domain within the limits of a State or elsewhere, except
" in the cases in which it is expressly granted. * * *
" Within the District of Columbia, and the other places
" purchased and used for the purposes above mentioned
" (viz., forts, arsenals, etc.,) the national and municipal
" powers of government, of every description, are united
" in the Government of the Union. And these are the
" only cases within the United States, in which all the
" powers of government are united in a single government,
" except in the cases already mentioned of the temporary
" Territorial governments, and there a local government
" exists."

In Cooley's Constitutional Limitations, 3d Ed. page 525, that learned author says:

"In the new Territories, however, where the Govern-
"ment of the United States exercises sovereign authority,
"it possesses, as incident thereto, the right of eminent do-
"main, which it may exercise directly or through the Ter-
"ritorial governments, but this right passes from the na-
"tion to the newly-formed State, whenever the latter is
"admitted into the Union."

In *Dobbins* v. *Commissioners*, 16 Peters, 447, this court said: Taxation is a sacred right essential to the "existence of government: an incident of sovereignty."

In *Providence Bk.* v. *Billings*, 4 Peters, 561, 563, Chief Justice MARSHALL, in speaking for the court, said: "That the taxing power is of vital importance; that it is "essential to the existence of government, are truths which "it cannot be necessary to reaffirm. They are acknowl-"edged and asserted by all. • • • The "power of legislation, and consequently of taxation, oper-"ates on all the persons and property belonging to the "body politic. This is an original principle, which has its "foundation in society itself. It is granted by all, for the "benefit of all. It resides in government as a part of "itself, and need not be reserved when property of any "description, or the right to use it in any manner, is "granted to individuals or corporate bodies. However "absolute the right of an individual may be, it is still in "the nature of that right, that it must bear a portion of "the public burthens; and that portion must be deter-"mined by the Legislature."

In *United States* v. *New Orleans*, 8 Otto, on pages 392–3, Mr. Justice FIELD, in speaking for this court, says:

"The position that the power of taxation belongs
"exclusively to the legislative branch of the Government,
"no one will controvert. Under our system it is lodged
"nowhere else. But it is a power that may be delegated
"by the Legislature to municipal corporations, which are
"merely instrumentalities of the State for the better ad-

" ministration of the Government in matters of local con-
" cern. When such a corporation is created, the power
" of taxation is vested in it as an essential attribute, for
" all the purposes of its existence, unless its exercise be in
" express terms prohibited. For the accomplishment of
" those purposes, its authorities, however limited the cor-
" poration, must have the power to raise money and control
" its expenditure."

Judge COOLEY, in his work on taxation, says, pages 3 and 4:

" *The taxing power an incident of sovereignty.*—The
" power of taxation is an incident of sovereignty, and is
" co-extensive with that of which it is an incident. All
" subjects, therefore, over which the sovereign power of
" the State extends, are, in its discretion, legitimate sub-
" jects of taxation; and this may be carried to any extent
" to which the Government may choose to carry it."

See, also,

Cooley on Con. Lim., 5th Ed. page 479, et seq.

Territorial governments are, " in substance and effect, municipal corporations on a large scale."

1 Dillon on Municipal Corporations, 2d Ed. Sec. 17.

The organic act of Dakota gave the Territorial Legislature authority to legislate upon " *all rightful subjects of legislation,*" with certain limitations as to taxing the property of non-residents no higher than the property of residents, etc., not material to this case. See—

12 Statutes at Large, p. 241.

" *A rightful subject* of legislation is a *subject* which,
" from the nature of things the course of experience, and
" the genius of our government, properly belongs to the
" legislation to regulate and control, as distinguished from
" those *subjects* which properly pertain to the judicial

"and executive departments of the government." Per DEADY, J., in construing the organic act of Washington Territory, in *Edwards* v. *Steamship Panama*, 1 Oregon R. p. 423.

In *The State* v. *New Orleans Navigation Company*, 11 Martin, 309, the Supreme Court of Louisiana held that the power to grant a charter to a private corporation was a "rightful subject of legislation," within the organic act of the Territory of Orleans.

In *Trustees of Vincennes University* v. *State of Indiana*, 14 How. 269, 272–3, this Court held that the Territorial Government of Indiana, which was organized under the ordinance of 1787, had authority to grant a charter of incorporation. The court say, page 273: "Under the ordinance the Legislature of the Territory was "vested with general legislative powers, restricted only by "the articles contained in that instrument. It had power "to grant an act of incorporation, with all the functions "necessary to effectuate its objects. There can be no "question, therefore, that the corporate powers vested in "the plaintiffs by the Legislature of the Territory were "legitimately conferred."

In *Swan* v. *Williams*, 2 Mich. 427, the Supreme Court of Michigan, in a very able and exhaustive opinion, held that the Territory of Michigan, under the ordinance of 1787, had authority to incorporate a railroad company and invest it with the power to acquire private property by condemnation proceedings. The court said, on page 429: "The most important question presented by this "case respects the constitutionality of the act of incorpora- "tion of the Detroit and Pontiac Railroad Company, in "so far as it authorizes the appropriation of private prop- "erty, for the purposes contemplated in the act, without "the consent of the owner. It is contended that the act is, "in this particular, in violation of the Constitution of the

" United States and of the ordinance of 1787." * *
(page 430.)

1. " Is it in violation of 'the ordinance of 1787 as " taking property upon no public exigency,' nor for the " 'common preservation.'" * * *

" Among the powers incident to all governments, and " necessary to their efficiency and preservation, are those " of organizing towns and counties, constructing roads " and bridges, and other highways, and assessing and col- " lecting taxes; and it cannot be contended for a moment " that the silence of the ordinance in any of these particu- " lars would argue a want of power in the Territorial legis- " latures to exercise them, as the public good or necessities " might require."

" Effective Territorial governments were as fully in " view of the framers of the ordinance, as effective State " governments which were to succeed them; and the re- " straints imposed upon the Territorial Legislatures were " upon their form and constitution, rather than upon their " *general* powers and jurisdiction. The authority to make " laws for the good government of the Territory, not re- " pugnant to the principles and articles of the ordinance, " was expressly delegated. The term 'good government' " embraces within its scope the whole range of legislation " necessary to secure the comfort, prosperity and happi- " ness of a people; and the authority could not be exer- " cised except as the usual attributes of sovereignty were " lodged in the Territorial governments. Among these is " the right to take private property for public use, when- " ever the public necessities or convenience demand it. " 'In every political sovereign community,' says Judge " DANIEL (6 *Howard*, 531), 'there inheres necessarily the " right and the duty of guarding its own existence and of " protecting and promoting the interests and welfare of " the community at large. This power and this duty are " to be exercised, not only in the highest acts of sover- " eignty and in the external relations of government; they

" reach and comprehend, likewise, the interior polity and " relations of social life, which should be regulated with " reference to the advantage of the whole society. This " power, denominated the *eminent domain* of the State, is, " as its name imports, paramount to all private rights " vested under the government, and these last are, by " necessary implication, held in subordination to this " power, and must yield, in every instance, to its proper " exercise.' And again (*Ib., p. 553*), he says: 'The in- " stances of the exertion of this power, in some mode or " other, from the very foundation of civil government, have " been so numerous and familiar, that it seems somewhat " strange, at this day, to raise a doubt or question con- " cerning it. In fact, the whole policy of this country " relative to roads, mills, bridges and canals rests upon " this single power, under which lands have always been " condemned; and without the exertion of this power not " one of the improvements just mentioned could be con- " structed.' Chancellor WALWORTH (in *3 Paige R. 73*) " says this right, denominated the *eminent domain*, 'is the " highest and most exact idea of property, and remains in " the government, or in the aggregate body of the people " in their sovereign capacity; and they have a right to " resume the possession of the property in the manner di- " rected by the Constitution and laws of the State, when- " ever the public interest requires it. This right of re- " sumption may be exercised, not only when the safety, " but also when the interest, or even when the expediency " of the State is concerned.'" * * *

" But, secondly, it is contended that this provision " of the act of incorporation is in violation of both the " ordinance and the Constitution of the United States

" 1. Because the property is not taken for public use.

" 2. Because the property, when taken, is not used by " the public, but by the corporation, for their own profit " and advantage; and

"3. Because the charter does not secure to the public "any right to use the road, or to require it to be used for "its benefit.

"We will examine these objections as one, for the "two last are, in fact, embraced in the first. 'A corpo- "ration,' says Chief Justice MARSHALL (*4 Wheat. 636*), "'is an artificial being, invisible, intangible, and existing "only in contemplation of law. Being the mere creature "of law, it possesses only those properties which the "charter of its creation confers upon it, either expressly "or as incidental to its existence. *These are such as are "supposed best calculated to effect the object for which it "was created.*' The more general subdivision of corpo- "rations, both in elementary works and reports, has been "into *public* and *private* corporations; the former embrac- "ing generally only municipal or political bodies, and the "latter all other associations, irrespective of their charac- "ter and objects; and in this class are usually comprised "turnpike, bridge, canal, and railroad companies.

"Over the former class it is said the Legislature pos- "sesses unlimited control, and may alter, modify or repeal "them, at pleasure; while the latter are regarded as "springing from contract between the Government and "individuals, over which it is generally said the Govern- "ment can exercise no control so long as the contract is "faithfully observed by the company. Universal as this "classification is, it appears to us to have been assented to, "rather from a sense of convenience than of strict pro- "priety, and that much confusion has crept into the "authorities from a too strict adherence to this general "subdivision. Most certain it is, that as to all their rights, "powers, and responsibilities, *three* grand classes of cor- "poration exist. 1. Political or municipal corporation, "such as counties, towns, cities, and villages, which from "their nature are subject to the unlimited control "of the Legislature. 2. Those associations which are

" created for *public benefit*, and to which the government
" delegates a portion of its sovereign power, to be exer-
" cised for public utility, such as turnpike, bridge, canal,
" and railroad companies. And 3. Strictly *private* cor-
" porations, where the *private interest* of the corporators
" is the primary object of the association, such as bank-
" ing, insurance, manufacturing and trading companies;
" and in this class may also be included eleemosynary cor-
" porations generally. Chief Justice MARSHALL, in
" *McCulloch* v. *The State of Maryland*, 4 Wheat. p. 316,
" in vindicating the power of Congress to charter a bank,
" says: 'The power to create a corporation is never used
" for its own sake, but for the purpose of effecting some-
" thing else.' The *object* defines the *character* of these
" associations, and by whatever name they may be styled,
" their rights and liabilities, and in many respects the ten-
" ure of their powers and franchises, depend upon entirely
" different considerations, and are derived from an entirely
" different legislative source.

" The object of *strictly private* corporations is to ag-
" gregate the capital, the talents, and the skill of individ-
" uals, to foster industry and encourage the arts. Private
" advantage is the ultimate, as well as the immediate ob-
" ject of their creation, and such as results to the public is
" incidental, growing out of the general benefits acquired
" by the application of combined skill, capital, and talents
" to the pursuits of commerce and of trade, and the neces-
" sities and conveniences of the community.

" But the object and the origin of that class of cor-
" porations represented by the defendants in this case, and
" which might, with far more propriety, be styled *public*
" *than private* corporations, are of an altogether different
" nature and character. Their very existence is based
" upon the delegation to them of the sovereign power
" to take private property for public use, and upon the
" continued exercise of th t power in the use of the prop-
" erty for the purposes for which it was condemned. They

" are the means employed to carry into execution a given " power. That private property can be taken by the Gov- " ernment from one and bestowed on another for private " use, will not for a moment be contended, and these cor- " porations can only be sustained upon the assumption " that the powers delegated are to a public agent, to work " out a public use. To say, as has been too often " carelessly said, 'that the acts done by these corpora- " tions are done with a view to their own interests, " from which an *incidental benefit* springs to the pub- " lic,' is to admit their private character, and the " private use of the property condemned to their use. " But it is obvious that the *object* which determines the " character of a corporation is that *designed* by the Legis- " lature, rather than that *sought* by the company. If that " object be primarily the private interest of its members, " although an incidental benefit may accrue to the Gov- " ernment therefrom, then the corporation is private; but " if that object be the public interest, to be secured " by the exercise of powers *delegated for that purpose*, " which would otherwise repose in the State, then, al- " though private interest may be incidently promoted, the " corporation is in its nature *public*—it is essentially the " *trustee* of the Government for the promotion of the " objects desired—*a mere agent* to which authority is " delegated to work out the public interest through the " means provided by Government for that purpose, " and broadly distinguishable from one created for the " attainment of no public end, and from which no benefit " accrues to the community, except such as results inci- " dentally, and not necessarily from its operations. In the " creation of this class of corporations, public duties and " public interests are involved, and the discharge of those " duties and the attainment of those interests are the " primary objects to be worked out through the powers " delegated to them. To secure these, the right of pre-

" eminent sovereignty is exercised by the condemnation
" of lands to their use—a right which can never be exer-
" cised for private purposes. How, then, can they be
" regarded as *private* associations, from the acts of which
" an *incidental* benefit only springs to the public? It
" argues nothing that compensation is required to be
" made for property taken before it can be used, for this
" is made by the Constitution a condition to the exercise
" of this right by the Government itself, and the delega-
" tion of the power necessarily carries the incident with it.

" Nor can it be said that the property when taken is
" not used by the public, but by the corporation for their
" own profit and advantage. It is unquestionably true that
" these enterprises may be, and probably always are, un-
" dertaken with a view to private emolument on the part
" of the corporators, but it is none the less true, that the
" object of the Government in creating them is public util-
" ity, and that private benefit, instead of being the occa-
" sion of the grant, is but the reward springing from the
" service. If this be not the correct view, then we con-
" fess we are unable to find any authority in the Govern-
" ment to accomplish any work of public utility through
" any private medium, or by delegated authority; yet all
" past history tells us that governments have more fre-
" quently effected these purposes through the aid of
" companies and corporations than by their immediate
" agents, and all experience tells us that this is the most
" wise and economical method of securing these improve-
" ments. The grant to the corporation is in no *essential*
" particular different from the employment of commission-
" ers or agents. The difference is in degree rather than
" in principle, in compensation rather than in power. The
" fact that the company receive the toll or compensation
" for transportation of persons and property over the road
" is conceived to be a reason and, in fact, the prominent
" reason, why these associations should be considered as

" private corporations; but the purpose designed by the
" Government in the construction of these roads is the *use*
" of the public, the expeditious communication and tran-
" sit from point to point, and not revenue. It would not
" be contended for a moment that private property could
" be taken, to be used for the latter purpose. The appro-
" priation of the tolls, therefore, can be regarded only as
" compensation, and affords no basis upon which to con-
" struct an argument respecting the character of the com-
" pany, or the validity of its charter.

" It is true, also, that the mode of conveyance and of
" travel is different upon this road from that upon turn-
" pikes and common highways, but this difference springs
" from the character and construction of the road and the
" vehicles employed, and not in the use designed. The
" one is equally intended, however, to open good and
" easy communications with the other; and so far as travel
" and the transportation of property are concerned, the
" public have the same rights in the one case as in the
" other, with this difference, that the means employed are
" varied with the mode of travel.

" The fact that upon railroads, individuals do not
" travel or transport property in their own vehicles, fur-
" nishes no argument in this particular, from the fact that
" the nature of the road, as well as the personal safety of
" individuals, renders it impossible that they should do so.
" If the right existed, it would not be exercised. Public
" security requires that the mode of travel and the means
" employed should be limited within, and subject to the
" control of the company, and the Legislature would have
" but indifferently secured the public interests in extending
" the privilege to all. Were the road built by the State,
" and managed by its immediate agents, the same disa-
" bilities as to promiscuous use would exist; but would it
" be contented in such case that the use was not public?

* * * * * *

"The power of the Government respecting public im-
"provements is a sovereign power. It rests in the wis-
"dom of the Legislature to determine when, and in what
"manner the public necessities require its exercise, and
"with the rea onableness of the exercise of that discre-
"tion courts will not interfere. (See *Charles River*
"*Bridge* v. *Warren Bridge*, 11 Peters, 420, 605.) These
"necessities change with the progress of society. That
"which would have satisfied the public demands a few
"years since, may perhaps now be wholly inadequate or
"useless. As new discoveries are made in science and
"adapted by art to the uses and wants of community, and
"its ever-changing condition, laws must adapt themselves
"to the existing state of things, not arbitrarily, but by nat-
"ural gradations. 'In a country like ours, free, active,
"and enterprising, continually advancing in numbers and
"wealth, new channels of communication are daily found
"necessary both for travel and trade, and are essential
"to the comfort, convenience, and prosperity of the peo-
"ple. (*11 Peters, 420, 547.*) The public have the right
"to avail themselves of the lights of modern science, and
"to partake of the benefit of the improvements which are
"now adding to the wealth and prosperity, and the con-
"venience and comfort of every other part of the civil-
"ized world,' and government must adapt itself to the ex-
"isting condition and wants of society, or its efficiency is
"destroyed. * * *

The only case which has the appearance of conflicting in any way with this long array of authorities is the celebrated case of *Dred Scott*, reported in 19 How., 393 to 633, decided in 1856.

But even that case does not conflict with any position taken by us in this argument. But this is the only case in which the sovereign power of Congress over the Territories has been held limited or restrained by any of the express limitations even found in the Constitution.

The majority of the court, as then constituted, simply held that the clause in the Constitution authorizing Congress to make all needful rules and regulations respecting the territory, or other property belonging to the United States, did not apply to territory acquired subsequent to the adoption of the Constitution, by treaty or conquest, from a foreign nation; and that Congress had no authority to deprive a slaveholder of his property in his slaves, because he took them into the Territory of Kansas; that this was in violation of the Constitution.

Mr. Justice CURTIS, in delivering his dissenting opinion, said, p. 623: "Before I proceed further to notice some other grounds of supposed objection to this "power of Congress, I desire to say, that if it were not "for my anxiety to insist upon what I deem a correct exposition of the Constitution, if I looked only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court "would answer those purposes equally well. For they "admit that Congress has power to organize and govern "the Territories until they arrive at a suitable condition "for admission to the Union; they admit, also, that the "kind of government which shall thus exist, should be "regulated by the condition and wants of each Territory, "and that it is necessarily committed to the discretion of "Congress to enact such laws for that purpose as that discretion may dictate; and no limit to that discretion has "been shown, or even suggested, save those positive prohibitions to legislate, which are found in the Constitution.

"I confess myself unable to perceive any difference "whatever between my own opinion of the general extent "of the power of Congress and the opinion of the majority of the court, save that I consider it derivable from "the express language of the Constitution, while they "hold it to be silently implied from the power to acquire "territory."

See also the able dissenting opinion of Chief Justice SHANNON, attached as a supplement to this brief, in which he reviews the *Dred Scott* case at considerable length, and finds from the principles laid down in that case ample authority in Congress to provide for the issuance of local municipal bonds in the Territories in aid of a railroad.

We now come to the case of *Rogers* v. *Burlington*, 3 Wall. 662, which, it seems to us in connection with the authorities before cited by us, must be treated as settling this question of the power of Congress or a Territorial Government to authorize a municipal corporation within a Territory to issue bonds in aid of a railroad.

In that case the charter of the city of Burlington was granted to it by the Territorial Legislature of Iowa, acting under an organic act similar to that given Dakota. By that charter it was authorized "*to borrow money for any public purpose.*"

When Iowa became a State the existing laws were continued in force.

Subsequent to the admission of Iowa as a State, bonds were issued by the city of Burlington in aid of a railroad, and the bonds so stated upon their face.

This court held those bonds valid and binding upon the corporation, saying on pages 662, 663–666:

"Charter of the defendants was granted on the tenth "day of June, 1845, by the Territorial Legislature acting "under its organic act.

"Subject to certain exceptions, not material to be "noticed, the sixth section of the act provided that the "legislative power of the Territory should extend to all "rightful subjects of legislation; and there can be no "question that the Territorial Legislature, acting under "that general delegation of legislative power, had the "authority to incorporate the defendants and confer upon "them, as such corporation, the functions specified in their "charter.

"Citation of authorities in support of the proposition "seems to be unnecessary, as it is not denied, and there- "fore it may be assumed, in the further consideration of "the case, that the corporate powers vested in the defend- "ants, as expressed in their charter, were legitimately "conferred. * * * *

"In considering this question, it will not be necessary "again to advert to the fact that the charter was granted "by the Territorial Legislature, because it has already "been shown that it has the same validity that it would "have had if it had been re-enacted by the Legislature of "the State.

"Municipal corporations are created by the Legisla- "ture, and they derive all their powers from the source of "their creation; and those powers are at all times subject "to the control of the Legislature. Such powers, also, in "the absence of any Constitutional regulation forbidding "it, may be enlarged or diminished, extended or cur- "tailed, or withdrawn altogether, as the Legislature shall "determine. Construction and repair of highways or "streets for public travel within their limits are among the "usual purposes of their creation, and the expenses of ac- "complishing those objects are among their usual and or- "dinary burdens. Railways, also, as a matter of usage, "founded on experience, are so far considered by the "courts as in the nature of improved highways, and as in- "dispensable to the public interest and the successful pur- "suit even of local business, that a State Legislature may "authorize the towns and counties of the State, through "which a railway passes, to borrow money, issue their "bonds, subscribe for the stock of the company, or pur- "chase the same, with the view of aiding those engaged "in constructing or completing such a public improve- "ment; and that a Legislative act conferring such au- "thority is not in contravention of any implied limitation "of the power of the Legislature. Decisions to that effect "have been very much increased in number within the

" last few years, and are constantly increasing both in the "State and Federal courts, until it may be said that the " rule here laid down pervades the jurisprudence of the " United States.

" Exceptional opinions advancing the opposite doctrine may be found, but they cannot be regarded as " sound, in view of the fact that the weight of authority is " very greatly the other way.

" Printed argument of the plaintiff shows that the Supreme Court of the State for a series of years held the " same views, as appears in some seven or eight of their " reported decisions; and it is proper to remark that the " reasons given for the conclusions in those several cases are " much more satisfactory than those assigned in the more " recent decisions which adopt the opposite rule.

" Repeated determinations of this court, embracing a " period of ten years, have expressed the concurrence of the " court in the general current of the decisions upon the subject in the State courts, and it is vain for parties to " expect that the court, in the face of those recorded judgments, can come to any different conclusion. Recent as " many of those decisions are, it seems unnecessary to " encumber the opinion with the names of the cases, or to " reproduce the reasons assigned as the basis of the respective judgments. Irrespective of the State decisions, it is " quite obvious that the decisions of this court control the " question under consideration, and, consequently, that no " further remarks upon the proposition is necessary, except " to say that the decision in the case of *Gelpcke* v. *The City* " *of Dubuque*, although the opinion of the court contains a " reference to other statutes, was chiefly founded upon the " construction of a provision in the charter of that city, " expressed in the same words as the provision contained " in the charter of the defendants. Decision, also, in the case " of *Meyer* v. *City of Muscatine*, is to the same effect. Unless, therefore, it be assumed that no prior decision of

"this court can furnish the rule in a subsequent contro-
"versy, it would seem that the present case is controlled by
"those decisions.

2. "Second proposition submitted is, that the defend-
"ants could not borrow money or purchase bonds in aid of
"the improvement specified in the ordinance, because such
"a work is not within the usual and ordinary objects to
"be accomplished by a municipal corporation, and conse-
"quently was not a public purpose within the meaning of
"that phrase, as employed in the charter of the city.
"They admit that the construction of a railroad is a pub-
"lic improvement, and they insist that the phrase, public
"purpose, as employed in the charter, must be limited in
"its signification to such public purposes as fall within the
"usual and ordinary sphere of municipal corporations.
"Undoubtedly there is much force in the latter sugges-
"tion, and it would seem that as applied to many improve-
"ments of great public utility, the proposition may well
"be conceded. None of the decided cases which main-
"tain the power of the State Legislature to authorize
"such material aid in the construction of railroads, decide
"or even intimate that the power may be exercised with-
"out limit, or be extended to a public enterprise entirely
"foreign to the general object which the corporation was
"created to observe. Those adjudications are not ob-
"noxious to any such charge, but the theory maintained
"is, that a railroad is nothing more than an improved
"highway, and that it is as competent for the Legislature
"to authorize a municipal corporation to furnish material
"aid in the construction of a railroad connected with the
"same as to construct a highway.

"Regarded in that point of view, they are analogous
"objects, and experience shows that the railroad, as well
"as the highway, is promotive of the highest and best in-
"terest of the corporation."

That taxation by a municipal corporation for the purpose of extending aid to a railroad by way of donation, loan of credit, or subscription, is taxation for a "public purpose," we suppose, is too well established to be again questioned in this court.

The following are some of the cases where the question has been discussed as well as passed upon by this court:

Railroad Company v. *County of Otoe*, 16 Wall. 672, 673.
Olcott v. *Supervisors*, 16 Wall. 693, 698.
St. Joseph Township v. *Rogers*, 16 Wall. 662, 663.
Township of Pine Grove v. *Talcott*, 19 Wall. 676, 677.

See, also, as to the public character of railroad companies:

Chicago, B. & Q. R. R. Co. v. *State of Iowa*, 4 Otto, 161, and
Munn v. *State of Illinois*, 4 Otto, 125, 130

In the case of *Olcott* v. *Supervisors*, 16 Wall. 693, 698, Mr. Justice STRONG, in speaking for the court, said:

"The entire legislative power of the State is con-
"fessedly vested in the General Assembly. An implied
"inhibition only is asserted. It is insisted that as the
"State can not itself impose taxes for any other than a
"public use, so the Legislature can not empower a muni-
"cipal division of the State to levy and collect taxes for
"any other than such a use, and it is denied that taxation
"to enable the county of Fond du Lac to aid in the com-
"pletion of the Sheboygan and Fond du Lac Railroad is
"taxation for a public use. No one contends that the
"power of a State to tax, or to authorize taxation, is not
"limited by the uses to which the proceeds may be de-
"voted. Undoubtedly taxes may not be laid for a pri-
"vate use. But is the construction of a railroad by a com-

"pany incorporated by a State for the purpose of building "it, and endowed with the State's right of eminent do- "main, a thing in which the State has, as such, no inter- "est? That the Legislature of Wisconsin may alter or "repeal the charter granted to the Sheboygan and Fond du "Lac Railroad Company is certain. This is a power re- "served by the Constitution. The railroad can, there- "fore, be controlled and regulated by the State. Its use "can be defined; its tolls and rates for transportation may "be limited. Is a work made by authority of the State "subject thus to its regulation, and having for its object "an increase of public convenience, to be regarded as "ordinary private property?

"That railroads, though constructed by private cor- "porations and owned by them, are public highways, has "been the doctrine of nearly all the courts ever since such "conveniences for passage and transportation have had "any existence. Very early the question arose whether "a State's right of eminent domain could be exercised by "a private corporation created for the purpose of con- "structing a railroad. Clearly it could not, unless taking "land for such purpose by such an agency is taking land "for public use. The right of eminent domain nowhere "justifies taking property for a private use. Yet it is a "doctrine universally accepted that a State Legislature "may authorize a private corporation to take land for the "construction of such a road, making compensation to "the owner. What else does this doctrine mean if not "that building a railroad, though it be built by a private "corporation, is an act done for a public use? And the "reason why the use has always been held a public one is "that such a road is a highway, whether made by the "Government itself or by the agency of corporate bodies, "or even by individuals when they obtain their power to "construct it from a legislative grant. It would be useless "to cite the numerous decisions to this effect which have

" been made in the State courts. We may, however, " refer to two or three which exhibit fully, not only the " doctrine itself, but the reasons upon which it rests.

" Whether the use of a railroad is a public or private " one depends in no measure upon the question who con- " structed it or who owns it. It has never been consid- " ered a matter of any importance that the road was built " by the agency of a private corporation. No matter " who is the agent, the function performed is that of the " State. Though the ownership is private, the use is pub- " lic. So turnpikes, bridges, ferries, and canals, although " made by individuals, under public grants, or by compa- " nies, are regarded as *publici juris*. The right to exact " tolls or charge freights is granted for a service to the " public. The owners may be private companies, but " they are compellable to permit the public to use their " works in the manner in which such works can be used. " That all persons may not put their own cars upon the " road, and use their own motive power, has no bearing " upon the question whether the road is a public highway. " It bears only upon the mode of use, of which the Legis- " lature is the exclusive judge.

" It is unnecessary, however, to pursue this branch of " the inquiry further, for it is not seriously denied that a " railroad, though constructed and owned by a private " corporation, is a matter of public concern, and that its " uses are so far public that the right of eminent domain " of the State may be exerted to facilitate its construction. " But it is contended that though the purpose and the use " may be public, sufficient to justify taking private prop- " erty, they are not public when the right to impose taxes " is asserted. It is argued that there are differences be- " tween the power of taxation and the power of taking " private property for a public use, and that because of " these differences it does not follow that wherever the one " power may be exerted the other can. We do not care

" to inquire whether this is so or not. The question now
" is whether if a railroad, built and owned by a private
" corporation, is for a public use, because it is a highway,
" taxes may not be imposed in furtherance of that use. If
" there be any purposes for which taxation would seem to
" be legitimate, it is the making and maintenance of high-
" ways. They have always been governmental affairs, and
" it has ever been recognized as one of the most import-
" ant duties of the State to provide and care for them.
" Taxation for such uses has been immemorially imposed.
" When, therefore, it is settled that a railroad is a
" highway for public uses, there can be no substantial
" reason why the power of the State to tax may not be
" exerted in its behalf. It is said that railroads are not
" public highways, *per se;* that they are only declared
" such by the decisions of the courts, and that they have
" been declared public only with respect to the power of
" eminent domain. This is a mistake. In their very na-
" ture they are public highways. It needed no decision
" of the courts to make them such. True, they must be
" used in a peculiar manner, and under certain restrictions,
" but they are facilities for passage and transportation
" afforded to the public, of which the public has the right
" to avail itself. As well might it be said a turnpike is a
" highway, only because declared such by judicial de-
" cision. A railroad built by a State no one claims would
" be anything else than a public highway, justifying taxa-
" tion for its construction and maintenance, though it could
" be no more open to public use than is a road built and
" owned by a corporation. Yet it is the purpose and the
" uses of a work which determine its character. And if the
" purpose is one for which the State may properly levy a
" tax upon its citizens at large, its Legislature has the
" power to apportion and impose the duty, or confer
" the power of assuming it upon the municipal divisions
" of the State. (*Cooley's Constitutional Limitations, p.*
" *262.*) And surely it cannot be maintained that owner-

" ship by the public, or by the State, of the thing in behalf
" of which taxation is imposed, is necessary to justify the
" imposition. There are many acknowledged public uses
" that have no relation to ownership. Indeed, most public
" expenditures are for purposes apart from any proprietor-
" ship of the State. A public use may, indeed, consist in
" the possession, occupation and enjoyment of property
" by the public, or agents of the public, but it is not
" necessarily so. Even in regard to common roads, gen-
" erally, the public has no ownership of the soil, no right
" of possession or occupation. It has a mere right of
" passage. While, then, it may be true that ownership of
" property may sometimes bear upon the question whether
" the uses of the property are public, it is not the test.

" The argument most earnestly urged against the con-
" stitutionality of the act is that it attempted to authorize
" Fond du Lac County to assist the railroad company by
" a donation. It is stoutly contended that the Legislature
" could not authorize the county to impose taxes to
" enable it to make a donation in aid of the construc-
" tion of the railroad, even if its ultimate uses are pub-
" lic. But why not? If the county can be empowered
" to aid the work because it is a public use, what difference
" can it make in what mode the aid be extended? It is
" conceded that in Wisconsin municipal corporations may
" be authorized to become subscribers to the stock of pri-
" vate railroad companies, and to raise money by taxation
" to meet bonds given in payment of the subscriptions.
" This has been decided by the highest court of the State.
" And the reasons given for the decision are, not that
" municipal bodies acquired property rights by their
" subscriptions, or that they thereby obtained partial con-
" trol of the railroad companies, but that subscrip-
" tions to the stock were a mode of aiding a work in
" which the public had an interest, a work of such a na-
" ture that it might properly be aided by taxation. Never
" was the right to tax supposed to rest in any degree upon

" anything else. Whether the stock had value or not was " not even considered. Equally with the taxation, the " municipal subscription could be justified only because it " was for a public use. If taxation is invalid because laid " for a private use, the nature of the case cannot be changed " by receiving stock for the money raised. There is no " substantial difference in principle between aid given to a " railroad company by subscription to its stock and aid " given by donations of money or land. The burden upon " the county may be the same in whichever mode the aid is " given, and the uses promoted are precisely the same, and " the courts have never attempted to make any distinction " in the cases ; certainly not until the case of *Whiting* v. " *Fond du Lac County*, and even then no real difference is " shown. On the other hand, the power to tax for the " purpose of making donations in aid of railroads built by " private corporations, has been affirmed."

In *Townshsp of Pine Grove* v. *Talcott*, 19 Wall. 676–677, Mr. Justice SWAYNE, in speaking for this court, said:

" The legislative power of a State extends to every- " thing within the sphere of such power, except as it is " restricted by the Federal Constitution or that of the " States. In the present case we have found nothing that, " in our judgment, warrants the conclusion that the act in " question is wanting in validity by reason of its uncon- " stitutionality.

" But it has been argued that, aside from any consti- " tutional prohibition, the Legislature had no power to " authorize the imposition of a tax for any other than a " public purpose, and that this act is not within that rule. " Conceding, for the purposes of this opinion, the sound- " ness of the first proposition, the second can by no means " be admitted.

" Though the corporation was private, its work was " public, as much so as if it were to be constructed by the " State. Private property can be taken for a public pur

" pose only, and not for private gain or benefit. Upon " no other ground than that the purpose is public can the " exercise of the power of *eminent domain* in behalf of " such corporation be supported. This view of the sub- " ject has been taken by the Supreme Court of Michigan. " (*Swann* v. *Williams*, 2 Mich. 427.)

" But, upon other grounds, we think the public char- " acter of such works cannot be doubted. Where they go " they animate the sources of prosperity and minister to the " growth of the cities and towns within the sphere of their " influence. Unless prohibited from doing so, a municipal " corporation has the same power to aid in their construc- " tion as to procure water for its water-works, coal for its " gas-works, or gravel for its streets from beyond its terri- " torial limits.

" Under the limited powers conferred by the Federal " Constitution, Congress has frequently given aid in such " cases. The Pacific Railroads and the Louisville Canal fur- " nish instances of such action by that body. The gift to " the sufferers from the overflow of the Mississippi, and prior " acts of the kind, must also be borne in mind. Cannot a " State Legislature do the same thing?"

II.

THE EXTRA SESSION OF THE DAKOTA LEGISLATURE, AT WHICH THE ACT OF APRIL 21, 1871, WAS PASSED, WAS LAWFUL.

The organic act of Dakota provides " that the legis- " lative power and authority of said Territory shall be " vested in a Governor and a Legislative Assembly." (See Sec. 4 of the Organic Act, 12 Statutes at Large, page 240.)

The same act also provides that the term of service of the members of the Council shall be two years, and of the House of Representatives one year.

It then prescribes the manner of conducting the first election, and provides "that the persons thus elected to "the Legislative Assembly shall meet at such place and "on such day as the Governor shall appoint, but thereafter the time, place and manner of holding and conducting all elections by the people, and the apportioning "the representation in the several counties or districts to "the Council and House of Representatives, according to "population, shall be prescribed by law, as well as the day "of commencement of the regular sessions of the Legislative Assembly: Provided, that no one session shall "exceed the term of forty days, except the first, which "may be extended to sixty days, but no longer." (See Sec. 4 of Organic Act, page 241, Statutes at Large, Vol. 12.)

It will be noticed that this organic act clearly implies that there may be other sessions than "*regular*" sessions, as otherwise it would be wholly unnecessary to insert the word "regular."

And a statute must be so construed as to give every word some meaning, if possible. No word should be treated as superfluous, if a significance can be given to it.

Platt v. *Union Pacific R. R. Co.*, 9 Otto, pp. 58, 59.

People v. *Burns*, 5 Mich. 114.

Othus v. *Inhabitants of Brookline*, 97 Mass. 466.

Gates v. *Solman*, 35 Cal. 576.

Decker v. *Hughes*, 68 Ill. 33, 41.

And another rule of construction is, that what is implied in a statute is as much a part of it as what is expressed.

Gelpcke v. *City of Dubuque*, 1 Wall. 220. (Case No. 81.)

Township of Pine Grove v. *Talcott*, 19 Wall. 676.

Butz v. *City of Muscatine*, 8 Wall. 581.
U. S. v. *Babbitt*, 1 Black, 61, and cases there cited.

In pursuance of this organic act, the Legislature of Dakota, at its first session, provided that "the regular annual sessions of the Legislature shall commence on the "first Monday of December in each year." (See Session Laws of Dakota, 1862, page 384.)

The Legislature did not provide for the time of holding *extra sessions*, as the organic act left that to be done by the Governor, as we have already shown. It would be impossible, from the nature of the case, to have the time for such extraordinary sessions fixed by law. No human being can see far enough into the future to determine in advance exactly when the emergency is going to arise which will necessitate the calling of the Legislature in extra session.

It would be a very defective government, indeed, which did not lodge the power with some one to call the Legislature together in extra session, to provide for the safety, comfort or relief of the people, as unexpected exigencies occurred requiring it.

Evidently Congress had this in mind in giving the Governor of Dakota the right to call the Legislature "to meet at such place and on such day as" he might appoint, except at the "*regular* sessions" after the first, which were to be fixed by law.

On the third of March, 1869, Congress, in passing the general appropriation bill, tacked on to the appropriations for governments in the Territories, this proviso: "*Provided*, "That hereafter the members of both branches of the "legislative assemblies of the several Territories shall be "chosen for the term of two years, and the sessions of "the legislative assemblies shall be biennial. And each "Territorial Legislature shall, at its first session after the

" passage of this act, make provision by law for carrying " this act into effect." (15 Stat. at Large, p. 300.)

Before that the members of the Territorial Legislatures, *for the purpose of earning their per diem from the Government*, had been accustomed to hold annual sessions. This was what this proviso was designed to stop.

We submit, it did not repeal the power from the Governor of Dakota, in the organic act, to call extra sessions of the Legislature, especially when the Territory was willing to bear the expenses of such extra session.

The proviso refers to "the sessions;" that is, the *usual*, *regular* sessions. The existence of the power in the Governor to call *extra sessions* is not inconsistent, we submit, with this proviso.

In *Maxwell on Interpretation of Statutes*, page 134, the author says: " Not only, therefore, is repeal by im- " plication not favored, but any construction involving it " is rejected in favor of any other which the language will " rationally bear."

To the same effect see—

The Distilled Spirits, 11 Wall. page 365.

U. S. v. *Walker*, 22 How. on page 311, and cases there cited.

It would be a great injustice to deprive the local government of the right to convene in extra session.

The language of this court in *Miner's Bank* v. *State of Iowa*, 12 How. on page 8, when speaking of the provision in the organic act of Wisconsin, which required all acts of the Territorial Legislature to be submitted to Congress, we think, is applicable. This court there said:

" Congress, in creating the Territorial governments, " and in conferring upon them powers of general legisla- " tion, did not, from obvious principles of policy and " necessity, ordain a suspension of all acts proceeding " from those powers until expressly sanctioned by them-

" selves, whilst for considerations equally strong they " reserved the power of disapproving or annulling such " acts of Territorial legislation as might be deemed detri- " mental.

" A different system of procedure would have been " fatal to all practical improvement in those Territories, " however urgently called for; *nay, might have disarmed* " *them of the very power of self-preservation. An inva-* " *sion, or insurrection, or any crisis demanding the most* " *strenuous action, would have had to remain without pre-* " *ventive remedy till Congress, if not in session, could be* " *convened, or, when in session, must have waited its pos-* " *sible procrastinated aid.*"

And can it be supposed that Congress, in attaching this proviso to that appropriation bill, intended to put an absolute prohibition upon the power of the local government to convene in extra session, when it would lead to such an injustice?

" All laws should receive a sensible construction. Gen- " eral terms should be so limited in their application as not " to lead to injustice, oppression, or an absurd consequence. " It will always, therefore, be presumed that the Legislature " intended exceptions to its language which would avoid " results of this character. The reason of the law in such " cases should prevail over its letter." (*Per Mr. Justice Field, in United States* v. *Kirby*, 7 Wall. 486, 487.)

Again, in construing this law, we must bear in mind that it is simply a *proviso* to an appropriation bill.

Congress was not, in passing this act, legislating generally for the Territories, but simply in reference to payment of claims upon the Government.

In the general appropriation act of 1872, we find this proviso: " *Provided*, that hereafter no expense for print- " ing, exceeding four thousand dollars, including printing " laws, journals, bills, and necessary printing of the same " nature, shall be incurred for any session of the Legisla- " ture of any of the Territories."

Now, suppose the Legislative Assembly of Dakota, in a session occurring after the passage of this law, should incur expenses to the amount of $8,000 for printing. What would be the consequences?

Would all the laws passed at that session of the Legislature be null and void, or would one half of them be null and void? If half, who would determine whether a given act was within the valid or the void half of the legislation?

It seems to us it is evident that the only consequences resulting from such excessive legislation would be that the Territory of Dakota would have to pay the extra expense incurred above that authorized by Congress.

And would not the same consequences flow from a session of the Legislative Assembly which was not authorized by Congress?

We do not intend by this to admit that we think an extra session is within the general language used in the proviso in question. But even if it was, it seems to us that the proviso could not be considered more than simply *directory*, so far as it related to the *power* to hold extra sessions, and only mandatory so far as it related to extinguishing the right of the Territories to demand that the expenses of the session should be paid by the General Government.

A proviso "is to be construed in connection with the section of which it is a part," as was said by Mr. Justice STRONG, in *Savings Bank* v. *The United States*, 19 Wall. on page 236.

The section of which this proviso forms a part, relates exclusively to financial questions—the liability of the Government. So does the whole act. The title of the act is "An act making appropriations for the legislative, executive and judicial expenses of the Government for the "year ending the thirtieth of June, eighteen hundred and "seventy."

In *Minis* v. *The United States*, 15 Peters, 445, this court limited general terms contained in a proviso to an appropriation bill, even though it was not claimed that the proviso related to anything beyond the liability of the Government—a matter germane to the rest of the act.

The court said, in that case, on page 445: "It would "be somewhat unusual to find engrafted upon an act "making special and temporary appropriation, any pro- "vision which was to have a general and permanent ap- "plication to all future appropriations. Nor ought such "an intention on the part of the Legislature to be pre- "sumed, unless it is expressed in the most clear and posi- "tive terms, and where the language admits of no other "reasonable interpretation. *The office of a proviso gen- "erally is either to except something from the enacting "clause, or to qualify or restrain its generality, or to exclude "some possible ground of misinterpretation of it, as ex- "tending to cases not intended by the Legislature to be "brought within its purview.* A general rule, applicable "to all future cases, would most naturally be expected to "find its proper place in some distinct and independent "enactment."

Again, we submit that the proviso, so far as it relates to regulating the time of the sessions, is simply *directory* and not *mandatory*.

"There are undoubtedly many statutory requisitions "intended for the guide of officers in the conduct of busi- "ness devolved upon them, which do not limit their power "or render its exercise in disregard of the requisitions "ineffectual. Such, generally, are regulations designed to "secure order, system and dispatch in proceedings; and "by a disregard of which the rights of parties interested "cannot be injuriously affected. Provisions of this charac- "ter are not usually regarded as mandatory, unless accom- "panied by negative words importing that the acts required "shall not be done in any other manner or time than that

" designated." Per Mr. Justice FIELD, in *French* v. *Edwards*, 13 Wall. on p. 511.

See, also,

Cooley's Constitutional Limitations (3d Ed.) pp. 74, 75 and 78, and cases cited.

Potter's Dwarris on Statutes, pp. 221-226, in notes and cases cited.

2 Dillon on Municipal Corporations (2d Ed.) Sec. 690.

The Legislative Assembly was only in session transacting business on thirty-five days, at the regular session which convened on the 5th of December, 1870, and adjourned on the 13th of January, 1871. Although the members of the Assembly, at this regular session manipulated their records so as to succeed in getting the Government to pay them for forty days' work, yet that did not change the *fact*. The second finding of facts in this case shows that they were, as a matter of fact, only in session thirty-five days.

They might have held sessions upon Sunday, as Congress has, but they *did not*. The second finding of fact is conclusive on that point.

The extra session only consumed *four* days. So they did not even then consume the whole forty days allowed them.

Congress recognized the act in question as an "*act passed by the Legislative Assembly of the Territory of Dakota*," and this amounted to a retroactive construction by Congress of the previous Congressional legislation in favor of the right of the members of the Territorial Legislature to convene in extra session. (See act of May 27, 1872, 17 Stat. at Large, 162-3. *Same in Record at pages 16-18.*)

" Retrospective laws which do not impair the obliga-
" tion of contracts or partake of the character of *ex post*

" *facto* laws, are not condemned or forbidden by any part " of the Constitution."

Satterlee v. *Matthewson*, 2 Peters, page 413.
Wilkinson v. *Leland*, 2 Peters, 627, 661.
Watson v. *Mercer*, 8 Peters, 88, 110, and cases there cited.

III.

THE ACT OF CONGRESS OF MAY 27, 1872, VALIDATES THE BONDS, EVEN THOUGH THE EXTRA SESSION OF THE DAKOTA LEGISLATURE WAS UNAUTHORIZED.

If we are wrong in our views of the power of the Dakota Legislature to convene in extra session in April, 1871, then we submit that the act of Congress, approved May 27, 1872 (17 Statutes at Large, 162–163, and set out in full on page 17 of the record in this case), is a sufficient grant of authority to Yankton County to sustain its action in issuing these bonds. There can be, we think, no question as to the power of Congress to legislate *directly* for the Territories, notwithstanding Congress may have granted Territorial charters or created local governments with power to legislate. There must, in the nature of things, be reserved by necessary implication, in the creation of such Territorial Governments, a power to modify or change the organic act as Congress may deem the public exigencies require. Congress has always assumed the power to legislate directly for the Territories, although no express reservation of such right is contained in the organic act.

In 1 Dillon on Municipal Corporations, section 17, that learned judge says :

" Congress habitually passes acts for the organization " of Territories and Territorial Governments, which are, " in substance and effect, municipal corporations on a large " scale, and of a peculiar character; but it is not within

"the power of Congress to establish ordinary municipal "corporations within the limits of the States, and it has "never attempted to exercise it.

"In a Territorial organic act, a provision that the "power of the Territorial Legislature 'shall extend to all "rightful subjects of legislation,' authorizes the Legisla- "ture to create municipal corporations, and to invest them "with the power to make ordinances, and to provide cor- "poration courts in which to enforce them."

The organic act of a Territory is like the charter of a municipal corporation granted by a State Legislature.

As to such charters, it has been repeatedly held that they are subject to repeal or modification at the pleasure of the Legislature, which may, in its discretion, recall to itself and exercise the legislative powers granted to the municipality.

"Restraints on the legislative power of control must "be found in the Constitution of the State, or they must "rest alone in the legislative discretion."

Cooley on Constitutional Limitations, 3d Ed., 192–193, and cases cited; also pp. 378–380.

1 Dillon on Municipal Corporations, 2d Ed., Secs. 38 and 168.

In Commissioners v. *Lucas*, 3 Otto, on page 114, this court said: "Municipal corporations are mere instrumen- "talities of the State, for the convenient administration of "government; and their powers may be qualified, enlarged "or withdrawn, at the pleasure of the Legislature."

See, to same effect, *Town of Mt. Pleasant* v. *Beckwith*, decided at the present term.

In *Laramie County* v. *Albany County*, 2 Otto, 307, this court applied this same principle to a municipal corporation created by the Territory of Dakota. The court made no distinction between the power of the Territorial Legislature over municipal corporations created by it, and

the power exercised by a State legislature over its municipal corporations.

Mr Justice CLIFFORD, in that case, in delivering the opinion of the court, said, page 310:

"Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the State, and it is well settled law that the charters under which such corporations are created, may be changed, modified or repealed, as the exigencies of the public service or the public welfare may demand. 2 *Kent's Com., 12th Ed. 305; Angell & Ames on Corporations, 10th Ed., Sec. 31; McKim* v. *Odom*, 3 Bland. 407; *St. Louis* v. *Allen*, 13 Mo. 400; *The Schools* v. *Tatman*, 13 Ill. 27; *Yarmouth* v. *Skillings*, 45 Me. 141.

"Such corporations are composed of all the inhabitants of the Territory included in the political organization, and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the Legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.—*1 Greenleaf on Ev., 12th Ed., Sec. 331.*"

And, on page 311—

"Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the Legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact."

(The same thing may be said of the relation which exists between Congress and the Territorial Legislature.)

Again, on page 312—

"Their officers are nothing more than local agents of "the State, and their powers may be revoked or enlarged, "and their acts may be set aside or confirmed, at the "pleasure of the paramount authority, so long as private "rights are not thereby violated. *Russell* v. *Reed*, 27 "Penn. St. 170."

And, on page 313—

"It (the Legislature) changes county sites, and orders "new roads to be opened, and new bridges to be built at "the expense of the counties; and no one, it is supposed, "disputes the exercise of such powers by the Legislature. "*Burns* v. *Clarion County*, 62 Penn. St. 425; *People* v. "*Pinkney*, 32 N. Y. 393; *St. Louis* v. *Russell*, 9 Mo. "507."

* * * *

"There must, in the nature of things, be reserved, "by necessary implication, in the creation of such corpo- "rations, a power to modify them in such manner as to "meet the public exigencies."

The Legislature (where not restrained by constitutional provisions) may authorize the officers of a municipal corporation to impose a tax upon private property, within the limits of a corporation, in aid of a railroad, or for any other public purpose, without submitting the question to a popular vote at all, if it so elects.

County of Callaway v. *Foster*, 3 Otto, 572.
St. Joseph Township v. *Rogers*, 16 Wall. 664, 665.
County of Moultrie v. *Savings Bank*, 2 Otto, 632.
County of Schuyler v. *Thomas*, 8 Otto, 175.
Thomson v. *Lee County*, 3 Wall. 330.
Railroad v. *County of Otoe*, 16 Wall. 676–677.

In the last case cited the facts were that the *Territorial Legislature* of Nebraska had, by an act approved January 1, 1861, authorized the commissioners of any county in the Territory to submit to the people the question whether the county would "aid or construct *any road*," "and said commissioners *may aid any enterprise* "*designed for the benefit of the county* as aforesaid, when- "ever a majority of the people thereof shall be in favor of "the proposition," etc.

Another section of the law provided that "when the "question submitted involves the borrowing or expendit- "ure of money, the proposition of the question must be "accompanied by a provision to lay a tax for the payment "thereof, in addition to the usual taxes, under section 16 "of this chapter; and no vote adopting the question pro- "posed shall be valid, unless it likewise adopt the assess- "ment of the tax to be levied to meet the liability in- "curred."

The county commissioners submitted to the people the question whether the county would issue $200,000 in bonds for the purpose of securing an Eastern railroad connection for Nebraska City, N. T. No proposition to levy a tax to meet the bonds was submitted.

The act of the Nebraska Territorial Legislature was, in substance, the same as the act of the Territorial Legislature of Dakota, of January 14, 1869, hereinafter referred to, which was in force when the Yankton County bonds were issued. And the county of Yankton, in voting for the issue of the bonds in litigation in this case, followed the requirements of this general act of January 14, 1869, in all respects, unless the omission to submit a proposition to levy a tax to meet the bonds was a departure from its provisions.

So we see that the case at bar is very similar to this case which went up from Nebraska—only in the Yankton County case there was still another act of the Territorial Legislature, in force at the time, authorizing the county

to issue the bonds (provided the act passed at the extra session of the Legislature is a valid act.)

After Nebraska had been admitted as a State, the State Legislature passed an act February 15, 1869, which, after reciting that a popular vote had been taken in the county of Otoe, in favor of issuing $200,000 of bonds to secure Nebraska City an Eastern railroad connection, authorized the county commissioners to *donate* $150,000 to the B. & Mo. R. R. Co., a foreign corporation.

This court said, through Mr. Justice STRONG, in deciding the bonds valid which were issued thereafter, without any other popular vote, on page 677:

"The second question upon which the Circuit Court "divided, was 'whether the County Commissioners of "'Otoe County could, under the act of February 15, "'1869, lawfully issue the bonds from which the coupons "'in suit were detached, without the proposition to vote "'the bonds for the purpose indicated, and also a tax to "'pay the same being or having been submitted to a vote "'of the people of the county, as provided by the act of "'the Territorial Legislature of Nebraska, passed Janu-"'ary 1, 1861.'"

"This question we answer in the affirmative. If the "Legislature had power to authorize the county officers to "extend aid, on behalf of the county or State, to a railroad "company, as we have seen it had, very plainly it could "prescribe the mode in which such aid might be extended, "as well as the terms and conditions of the extension, and "it needed no assistance from a popular vote of the muni-"cipality. Such a vote could not have enlarged legisla-"tive power. But the act of 1869 was an unconditional "bestowal of authority upon the county commissioners to "issue the bonds to the railroad company. It required "no precedent action of the voters of the county. It "assumed that their assent had been obtained. That "prior to 1869 the sanction of approval by a local popular

" vote had been required for municipal aid to railroad com-
" panies, or improvement companies, is quite immaterial.
" The requisition was but the act of an annual legislature
" which any subsequent legislature could abrogate or
" annul."

It seems to us the foregoing case is decisive upon the question of the effect of the curative act of Congress, especially when we also take into consideration the subsequent act of the Territorial Legislature of Dakota, passed December 21, 1872, at a regular session, recognizing the bonds in question as the legal obligations of Yankton County, and providing for the payment of the interest falling due upon the same; and also the conduct of Yankton County ratifying the issue of the bonds in a number of different ways.

It certainly is difficult to see why a Legislature, when not hampered by constitutional restrictions upon the subject, as Congress and the Dakota Legislature were not, may not, in the exercise of its admitted power to tax private property to any extent in its discretion, so that the taxation is for a public purpose, *compel* the officers of a municipal corporation, or others selected or appointed by the Legislature for that purpose, to issue bonds or other obligations binding upon the municipality or district indicated, to aid a railroad which furnishes an improved public highway for the benefit and convenience of the inhabitants of the district who are taxed to pay the obligations so incurred.

If no approving popular vote is required, as this court has held over and over again is not necessary, why cannot the Legislature declare that certain bonds which have been or are about to be issued by the local officers of a municipal corporation, in the name of the corporation, to aid a local public improvement, shall be binding upon the municipality, even though before that they were null and void. If the *power* rests in the Legislature, and the charter of the corporation is subject to modification or repeal at the

pleasure of the Legislature, what stands in the way of the exercise, by the Legislature, of the power it possesses?

This court held, in the case of *Sheboygan County* v. *Parker*, 3 Wall. 93, that a State Legislature can appoint its own agents or commissioners to issue the bonds, even though the county has officers of its own at the same time.

In *United States* v. *Railroad*, 17 Wall. 329, 331, 332, this court said :

" A municipal corporation, like the city of Baltimore, " is a representative not only of the State, but is a portion " of its governmental power. It is one of its creatures, " made for a specific purpose, to exercise within a limited " sphere the powers of the State.

" The State may withdraw these local powers of gov- " ernment at pleasure, and may, through its Legislature or " other appointed channels, govern the local territory as " it governs the State at large."

* * * * * * *

" The city had authority to expend its money in " opening squares, in widening streets, in deepening rivers, " in building common roads or railways. The State could " do these things by the direct act of the Legislature, or it " could empower the city to do them."

* * * * * * *

" The power in question (to issue bonds to aid a rail- " way) was conferred because its exercise concerned the " public and to benefit that public. This power could, no " doubt, have been imposed upon the city as a duty, and " its exercise directed without the assent or against the " wish of the corporation or its citizens. The State could " do it directly for and on behalf of the city, and without " its intervention. The city could act only by authority " from the State. The State is itself supreme, and needs " no assent or authority from the city It is not per- " ceived that the act is less public and municipal in its " character than if the State had compelled the city to lay

" the tax and to make the appropriation of the proceeds " to the railroad company.

" In *The Town of Guilford* v. *The Board of Super-" visors of Chenango County*, 3 Kernan, 143, it was held :

" 1. That the Legislature has power to levy a tax " upon the taxable property of a town and appropriate the " same to the payment of a claim made by an individual " against the town.

" 2. That it is not a valid objection to the exercise " of such power, that the claim to satisfy which the tax is " levied is not recoverable by action against the town.

" 3. That it does not alter the case that the claim " has been rejected by the voters of the town, when sub- " mitted to them at a town meeting, under an act of the " Legislature authorizing such submission, and declaring " that their decision should be final and conclusive."

In *County of Leavenworth* v. *Barnes*, 4 Otto, 70, 72–73, the election had taken place before any act was passed authorizing bonds to be issued, and of course all that could possibly be said against the election held in Yankton County on the second day of September, 1871, could be said against the election held in Leavenworth County before the act of the Legislature was passed. If the vote of Yankton County cannot be said to represent the wishes of the citizens of that county, then, *a fortiori*, the vote taken in Leavenworth County could not. But the Legislature in general terms provided as follows :

" In case the Board of Commissioners of any such " county have heretofore submitted to the electors of such " county the question of issuing bonds to any railroad " company, and at such election such electors voted to " issue such bonds, such board are hereby authorized to " issue such bonds and subscribe for stocks, not exceeding " the amount as provided in the first and third sections of " this act."

As to the force and effect of this provision this court said, page 72 :

"This is an explicit authority from the Legislature to "the county board to adopt any previous expression of "the electors of their willingness to make such subscrip- "tion. It is conclusive upon the point under consider- "ation."

This court has in numerous cases upheld the application of the maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* to curative acts of the Legislature.

The following are some of the cases in which this court has held that acts of the Legislature legalizing the bonds *before they were issued* by the officers of the corporation, is sufficient to make the bonds binding upon the corporation.

Lee County v. *Rogers*, 7 Wall. 185, 187.
Gelpcke v. *City of Dubuque*, 1 Wall. 220, 221.
St. Joseph Township v. *Rogers*, 16 Wall. 664, 665.
Meyer v. *City of Muscatine*, 1 Wall. 390.
Thompson v. *Lee County*, 3 Wall. 327, 331.

Ritchie v. *Franklin County*, 22 Wall. 68, 76. In this case the law authorized new bonds to be issued by the County Court, to take up the old ones which had already been declared void by the Supreme Court. This court said, in deciding that the new bonds so issued by the County Court, in exchange for the bonds that had been declared void, were valid: "We agree with the Supreme "Court of Missouri, that the act in question, being an "authority to do a particular thing, may be construed as "an original power. But whether it be treated as an "original power or as curative and confirmatory legislation, "it is equally valid, and this is the view taken of the sub- "ject by that court. (*Steines* v. *Franklin Co.*, 48 Missouri, "175.)"

The following are some of the cases in which this court has held the curative acts validated the bonds,

though the bonds had been already issued when the curative act was passed:

New Orleans v. *Clark*, 5 Otto, 644, 653-4.
Commissioners v. *Thayer*, 4 Otto, on pages 642-3.
City v. *Lamson*, 9 Wall. 478, 485.
Campbell v. *Kenosha*, 5 Wall. 194, 203.
Beloit v. *Morgan*, 7 Wall. 623, 624.

In these last three cases, however, the words and clauses which it was held amounted to a ratification, were contained in amendments to the charters of the corporations. In one case, it is said the amendment was accepted by the city, and it is probable the amendments were accepted by the officers of the corporation in the other cases. In the last case this court said, page 624: "The "only point to be considered is the effect of this provi- "sion. That is not an open question in this court. "Whenever it has been presented, the ruling has been "that, in cases of bonds issued by municipal corporations "under a statute upon the subject, ratification by the "Legislature is, in all respects, equivalent to original au- "thority, and cures all defects of power, if such defects "existed, and all irregularities in its execution. (*Gelpcke* "v. *Dubuque*, 1 Wallace, 220; *Thompson* v. *Lee County*, "3 Id. 327.) The same principle has been applied in the "courts of the States. (*Wilson* v. *Hardesty*, Maryland "Ch. Decisions, 66; *Shaw* v. *Norfolk Co. R. R. Co.*, 5 "Gray, 180.) This court has repeatedly recognized the "validity of private and curative statutes, and given them "full effect, where the interests of private individuals were "alone concerned and were largely involved and affected. "(*Satterlee* v. *Mathewson*, 2 Peters, 380; *Wilkinson* v "*Leland*, Id. 627; *Leland* v. *Wilkinson*, 10 Id. 294; "*Watson* v. *Mercer*, 8 Id. 88; *Charles River Bridge* v. "*Warren Bridge*, 11 Id. 420; *Stanley* v. *Colt*, 5 Wallace, "119; *Croxall* v. *Shereid*, Id. 268.) The earlier and

" more important of these authorities are so well known " to the profession and are so often referred to, that it " would be a waste of time to comment upon them."

In *New Orleans* v. *Clark*, 5 Otto, 644, 653, 654, this court held, that bonds which were *invalid and illegal* were rendered valid and obligatory by the *curative effect* (the act was not passed for that purpose) of a certain act passed by the Legislature after the suit in question had been commenced, and had been pending about a year, upon the bonds brought by the appellee, Clark. The corporation of Carrollton had, it is true, received the consideration for which the bonds had been issued.

Mr. Justice FIELD, in delivering the unanimous opinion of this court in that case, said, on page 654: " The " power of taxation which the Legislature of a State pos- " sesses may be exercised to any extent upon property " within its jurisdiction, except as specially restrained by " its own or the Federal Constitution; and its power of " appropriation of the moneys raised is equally unlimited. " It may appropriate them for any purpose which it may " regard as calculated to promote public good. Of the " expediency of the taxation, or the wisdom of the " appropriation, it is the sole judge. The power which it " may thus exercise over the revenues of the State, it " may exercise over the revenues of a city, for any " purpose connected with its present or past condition, " except as such revenues may, by the law creating them, " be devoted to special uses; and in imposing a tax, it " may prescribe the municipal purpose to which the mon- " eys raised shall be applied. A city is only a political " subdivision of the State, made for the convenient admin- " istration of the government. It is an instrumentality, " with powers more or less enlarged, according to the " requirements of the public, and which may be increased " or repealed at the will of the Legislature. In directing, " therefore, a particular tax by such corporation, and the " appropriation of the proceeds to some special municipal

" purpose, the Legislature only exercises a power through
" its subordinate agent, which it could exercise directly;
" and it does this only in another way, when it directs
" such corporation to assume and pay a particular claim
" not legally binding for want of some formality in its
" creation, but for which the corporation has received an
" equivalent.

" *The People, ex rel. Blanding*, v. *Burr*, 13 Cal. 343;
" *Town of Guilford* v. *Supervisors of Chenango County*,
" 18 Barb. (N. Y.) 615; S. C., 13 N. Y. 143."

In *Cooley on Const. Lim., 3d Ed. 379, 380*, that author says:

" We have already referred to the case of contracts
" by municipal corporations which, when made, were in
" excess of their authority, but subsequently have been
" confirmed by legislative action. If the contract is one
" which the Legislature might originally have author-
" ized, the case falls within the principle above laid down,
" and the right of the Legislature to confirm it must be
" recognized. This principle is one which has very often
" been acted upon in cases of municipal subscriptions to
" works of internal improvement, where the original un-
" dertaking was without authority of law, and the au-
" thority given was confirmed by statute retrospec-
" tively. It has not usually been regarded as a cir-
" cumstance of importance in these cases, whether
" the enabling act was before or after the corporation had
" entered into the contract in question; and if the Legis-
" lature possesses that complete control over the subject
" of taxation by municipal corporations which has been
" declared in many cases, it is difficult to perceive how
" such a corporation can successfully contest the validity
" of a special statute which only sanctions a contract pre-
" viously made by the corporation, and which, though at
" the time *ultra vires*, was nevertheless for a public and
" local object, and compels its performance through an ex-
" ercise of the power of taxation."

We are aware that some courts have denied the power of the Legislature of a State to *compel* a municipal corporation to levy a tax to pay an obligation which it had repudiated and refused to recognize, but we do not know of any authority holding that a State Legislature (where not limited by constitutional restrictions) may not validate obligations which could have been originally authorized, provided the officers of the corporation who represent it, *quoad hoc*, assent to the validating act by issuing the bonds thereafter or otherwise.

In this case it is not necessary for us to invoke the doctrine that the Legislature or sovereign power may impose a burden upon a municipality of this kind without its consent.

Yankton County and the Territorial Legislature have both fully signified their willingness to treat these bonds as valid obligations binding upon Yankton County since the curative act was passed by Congress.

There cannot, it seems to us, be the slightest doubt from the language of the act of Congress, that it was the *intention* of Congress to validate the bonds in question. That act says: "And the provisions of the act of the "legislative assembly first aforesaid, *as far as the same* "*authorize, and for the purpose of validating any vote of* "*aid and subscriptions to said company for the construc-* "*tion, completion and equipment of the main stem of said* "*railroad between the termini aforesaid*, ARE HEREBY "DECLARED TO BE, and remain IN FULL FORCE, but no "further and for no other purpose whatsoever." (*See Record, pp. 17 and 18.*)

It is not necessary to set forth the provisions of a statute in full. One Legislature may adopt the statute of another Legislature by a simple reference to it. So that the identity of the statute is established, that is all that is necessary.

See *Kendall* v. *United States*, 12 Peters, on p. 625.

The following objections have also been urged against the validating effect claimed by us to arise from the act of Congress of May 27, 1871:

1. That the Dakota Southern Railroad Company was not lawfully incorporated when the vote was taken in September, 1871, because it is claimed that the Territorial Legislature had no authority to pass the general incorporation act of January 6, 1868, under which the railroad company was organized.

2. That the act of Congress gave the company the right to construct its road further than was specified as the line of the road in the articles of incorporation.

3. That the act of Congress changed the vote of Yankton County from a *donation* into a *subscription* to the capital stock of the railroad company.

We will consider these objections in the order above named.

The general incorporation law of Dakota, under which this railroad company was organized, was passed at a regular session of the Dakota Legislature. *See Session Laws of Dakota, for 1867–8, pages 154–199.*

Under the organic act, the Territorial Legislature had authority to legislate upon *all rightful subjects of legislation*, with certain enumerated exceptions not material here to state.

This, as we have already shown by the authorities quoted in support of our first point, included the right to grant charters of incorporation. But it is said the act of Congress approved March 2, 1867 (14 Statutes at Large, page 426), repealed or took away this power.

That act provided "That the legislative assemblies of "the several Territories of the United States shall not, "after the passage of this act, grant private charters or "especial privileges, but they may, by general incorpora- "tion acts, permit persons to associate themselves together "as bodies corporate for mining, manufacturing, and "*other industrial pursuits.*"

Repeals by implication are not favored. And we submit that this falls far short of repealing the general incorporation acts of Dakota and other Territories authorizing the incorporation of railroads.

And on the 10th day of June, 1872, Congress itself put this interpretation upon the act. See 17 Statutes at Large, page 390, where it is enacted "that the first sec- "tion of an act approved March 2, 1867, entitled, 'An "act amendatory of an act to provide a temporary gov- "ernment for the Territory of Montana,' approved May "26, 1864, so far as relates to incorporations which have "been, or which may hereafter be, created and organized "for the business of mining, manufacturing, or other in- "dustrial pursuits, or the construction or operation of "railroads, wagon roads, irrigating ditches, and the colo- "nization and improvement of lands in connection there- "with, or for colleges, seminaries, churches, libraries, or "any benevolent, charitable or scientific association, and "for all rightful subjects of legislation consistent with the "Constitution of the United States, under the general "incorporation laws of any Territory of the United States, "shall be construed as having authorized and authorizing "the legislative assemblies of the Territories of the United "States, by general incorporation acts, to permit persons "to associate together as bodies corporate for purposes "above named."

Besides, the act of Congress of May 27, 1871, cured any defect in the organization of the Dakota Southern Railroad Company. That act expressly provides that

" the Dakota Southern Railroad Company, as organized " under and in conformity to the acts of the legislative as- " sembly of said Territory, is hereby reorganized and " declared to be a legal and valid corporation."

Again, it would seem to matter little whether the Dakota Southern Railroad Company was a corporation *de jure* or a corporation *de facto*. It certainly was a corporation *de facto*. The county of Yankton contracted with it and treated it as a corporation *de jure*, and hence the county ought to be estopped from questioning its corporate existence.

Section 382 of the civil code of Dakota, enacted January 12, 1871 (see session laws of Dakota, 1870–1, page 74), provides that " one who assumes an obligation to an " ostensible corporation, as such, cannot resist the obliga- " tion on the ground that there was in fact no such corpo- " ration, until that fact has been adjudged in a direct pro- " ceeding for that purpose."

It is not pretended that there has ever been any such adjudication in reference to the " Dakota Southern Railroad Company."

In *Commissioners* v. *Bolles*, 4 Otto, 104, this court held a county was estopped in a suit upon its railroad aid bonds, by a third party to question the corporate existence of the railroad company to which the bonds were issued, as it built the road, and was at least a corporation *de facto*. The court say, " Whether the St. Louis, Law- " rence and Denver Railroad Company was lawfully a cor- " poration, capable of contracting with the defendants " below, is a question that cannot be raised in this case." * * * " It has been a corporation *de facto* at " least if not *de jure* from the date of its organization. Its " corporate existence, therefore, and its ability to contract " cannot be called in question in a suit brought upon evi- " dences of debt given to it."

See, also,

County of Leavenworth v. *Barnes*, 4 Otto, 72, 73.

Darlington v. *Le Clede County*, 1 Dillon C. C. 200.

County of Macon v. *Shores*, 7 Otto, 272.

Chubb v. *Upton*, 5 Otto on page 667, and cases there cited.

If the "Dakota Southern Railroad Company" had been, up to the time of the passage of the act of Congress of May 27, 1871, a mere copartnership company, and if the vote of Yankton County, previously taken, to issue bonds to it, could not be sustained on that ground, this validating act of Congress operated to make the company a corporation from the date that act was approved, at least, and authorized the county to issue to it thereafter the bonds previously voted. This, Congress had the power to do, because it had the right May 27, 1871, to incorporate a railroad corporation in Dakota, and at the same time to authorize the county of Yankton, into which the road ran, to issue it $200,000 of bonds to aid its construction, *without any approving popular vote at all.*

It is not necessary for us to discuss the question whether Congress had the right to appoint its own agents or officers to issue the bonds, without giving the county or its representatives any voice in the matter. We think the decisions of this court will fully justify such an exercise of power by the Legislatures of the States, and if a State Legislature could, then, according to the authorities referred to under our first point made in this argument, Congress possesses the power to do it in a Territory—certainly in Dakota, which was acquired after the adoption of the Constitution.

We shall hereafter show that Yankton County consented to and acquiesced in the authority given to it by this act to issue bonds to the Dakota Southern Railroad

Company, as "recognized and declared to be a legal and "valid corporation, by act of Congress approved May 27. "1872," and that it is estopped on many accounts from setting up that it never gave its consent.

2. The next objection is, that the act of Congress gave the company the right to construct its road further than was specified as the line of the road in the articles of incorporation.

The articles of incorporation state that it is the intention of the corporators to organize themselves into a legally incorporated railroad company, under and by virtue of the provisions of the general incorporation act of Dakota, approved January 6, 1868, "under the name and style of "the 'Dakota Southern Railroad Company,' for the pur- "pose of constructing and operating a line of railroad "from the city of Yankton on the Missouri River, east- "ward through the counties of Yankton, Clay and Union "to a point on the Big Sioux River, between townships "Nos. 88 and 93, inclusive." (*See p. 20 of Record.*)

The act of Congress says: "But the passage of this "act shall not invalidate or impair the organization of the "company heretofore organized for the construction of "the Dakota Southern Railroad, leading from Sioux City, "Iowa, by way of Yankton, the capital of said Territory, "to the west line of Bon Homme County, or any vote "that has been or may be given by the counties of Union, "Clay, Yankton and Bon Homme, or any township "granting aid to said railroad, or any subscription thereto, "or anything authorized by, and that may have been "done in pursuance of the provisions of the aforesaid "act of the legislative assembly of said Territory, toward "the construction and completion of said railroad; and "the said *Dakota Southern Railroad Company, as organ-* "*ized under and in conformity to the acts of the legislative* "*assembly of said Territory, is hereby recognized and de-* "*clared to be a legal and valid corporation.*"

* * * "And for the purpose of enabling the "said Dakota Southern Railroad Company to construct "its said road through the public lands between the "termini aforesaid, the right of way through said public "lands is hereby granted to said company to the extent "of one hundred feet in width on each side of said road: "*Provided*, that nothing in this act shall relieve said Da- "kota Southern Railroad Company from *constructing and* "*completing* said railroad in accordance the *conditions* and "*stipulations* under which the citizens of the counties "therein named voted aid to said railroad in accordance "with the laws of said Territory, approved April 21, "1871."

Now, we submit that this proviso completely overthrows all foundation for this objection. The act expressly declared that the company "*as organized under and in* "*conformity to the acts of the legislative assembly of* "*Dakota*," is a legal and valid corporation." At the same time it gives it authority to extend its line further than the company, "as *organized*," had the right to (as is claimed), but only subject to a certain proviso.

If the citizens of Yankton County "voted aid to said railroad," under a *condition* or *stipulation* that the road should be *constructed* and *completed* only from the Big Sioux River to the city of Yankton, then this act does not "relieve said Dakota Southern Railroad Company" from so "constructing and completing" its road. If that is the *fact*, then the railroad company did not by this act of Congress obtain the right to extend its line, without the consent of the county of Yankton, and if it should attempt to do so under the claim that it was *relieved* from "constructing and completing" its road as originally contemplated, a court of equity at the suit of Yankton County would restrain it.

The railroad company has not yet extended its line beyond Yankton County, and may never attempt to do

so. It has built, or caused to be built, an eastern extension to its road, from the Big Sioux River (the eastern terminus under the articles of incorporation) to Sioux City, a distance of four or five miles. This, however, is all in the State of Iowa, and was required and demanded by Yankton County from the railroad company before the act of Congress was passed (*see page 26 of Record*), as well as afterwards, as we shall show.

Again, the general incorporation act under which the railroad company was organized, authorized the company to "construct branches from the main line to other towns or places within the limits of this Territory." (Sec. 75, page 180, Laws of 1867–8.) And the company was also "empowered to extend their road into or through any "other State or Territory, under such regulations as may "be prescribed by the laws of such State or Territory "through which such road may be extended." (Sec. 115 of said act, page 193, Laws of 1867–8.)

See, also, Sec. 95 (page 188), which authorizes any railroad existing in pursuance of law, to "lease or pur-"chase any part or all of any railroad constructed by any "other company, if said company's lines of said road are "contiguous or connected as aforesaid, upon such terms "and conditions as may be agreed on between said com-"panies respectively." See, also, sections 89 to 93, which authorize one road to consolidate with another.

Besides this, the civil code in force when this vote was taken by Yankton County, provided: "Sec. 381— "Every grant of corporate power is subject to alteration, "supervision or repeal, in the discretion of the Legisla-"ture."

It seems to us, therefore, that the citizens of Yankton County must be presumed to have known, when they voted to extend aid to the Dakota Southern Railroad Company, that its line might be extended to the west line of Bon Homme County, in Dakota Territory, or to Sioux City, in the State of Iowa.

The act of Congress did not give the railroad company any new powers in this respect, except that the right of way over the public lands was donated to it by the General Government.

So that, even if we should strike out the *proviso* in the act of Congress (which, we submit, is as broad as the change in the construction and completion of the road authorized by the act), still the county cannot complain that any change in the construction and completion of the road has been authorized by the act of Congress which the county of Yankton had not a right to expect when the vote was taken.

Hence, the county cannot complain that they have been defrauded or imposed upon by the Congress of the United States.

In *Nugent* v. *Supervisors*, 19 Wall. 242, this court held a county was not released from its agreement to take stock in a railroad company, by a subsequent alteration of the organization or purposes of the company, when such alteration is "provided for, or contemplated by either the "charter itself or the general laws of the State."

On page 248 the court say: "The Circuit Court, how-"ever, was of opinion, and so decided, that the bonds are "invalid, because before their delivery the Kankakee and "Illinois River Railroad Company had become consoli-"dated with the Plymouth, Kankakee and Pacific Rail-"road Company, another corporation. This consolidation "was authorized by the general laws of the two States, "and by a section in the special charter of the latter "company. No claim is made that it was not legally "effected. The result necessarily was, that the consoli-"dated company succeeded to all rights, property and "privileges which belonged to each of the two companies "out of which it was formed before their consolidation. "It was not until after this had taken place that the "county bonds were handed over and sold, and it was "certificates of the stock of the consolidated company

" which the county received. What, then, was the legal " effect of the consolidation? Did it release the county " from its prior assumption to take stock in the Kankakee " and Illinois River Railroad Company, and give its bonds " in payment? Or did it render unauthorized the subse- " quent delivery of the bonds, and make them invalid " even in the hands of a *bona-fide* purchaser? These are " the only questions presented by the record that need " discussion. It must be conceded, as a general rule, that " a subscriber to the stock of a railroad company is " released from obligation to pay his subscription by a " fundamental alteration of the charter. The reason of " the rule is evident. A subscription is always presumed " to have been made in view of the main design of the " corporation, and of the arrangements made for its " accomplishment.

" A radical change in the organization or purposes of " the company may, therefore, take away the motive " which induced the subscription, as well as affect inju- " riously the consideration of the contract. For this rea- " son it is held that such a change exonerates a subscriber " from liability for his subscription; or, if the contract has " been executed, justifies a stockholder in resorting to a " court of equity to restrain the company from applying " the funds of the original organization to any project not " contemplated by it. But while this is true as a general " rule, it has no applicability to a case like the present.

" The consolidation of the Kankakee and Illinois " River Railroad Company with another company was no " departure from its original design. The general statute " of the State, approved February 28, 1854, authorized " all railroad companies then organized, or thereafter to be " organized, to consolidate their property and stock with " each other, and with companies out of the State, when- " ever their lines connect with the lines of such companies " out of the State.

"The act further declared that the consolidated com-
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"The special charter of the Kankakee and Illinois
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"It was therefore contemplated by the Legislature,
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"When the voters of the county of Putnam sanctioned a
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" of Kansas (Laws 1862, page 768). We are cer-
" tainly of opinion that when the parties interested
" in the two companies are content; when the newly-
" made company has been in operation for ten years;
" when the county has received and held its stock until
" 1869; when the same was sold by the county by author-
" ity of the Legislature, it is not competent for such a
" contracting party to say that there was an irregularity in
" the organization of the company. *Bigelow on Estoppel*,
" *464; Moran* v. *Commissioners*, 2 Black. 722; *Zabriskie*
" v. *Cleveland*, 23 How. 400; *Pendleton* v. *Amy* 13 Wall.
" 297."

See, also,

Commissioners v. *Clark*, 4 Otto, on p. 286.
County of Ray v. *Vansycle*, 6 Otto, 675, 688.
County of Scotland v. *Thomas*, 4 Otto, 682.
County of Henry v. *Nicolay*, 5 Otto, 619.
County of Callaway v. *Foster*, 3 Otto, 567.
Township of Empire v. *Darlington*, Chicago Legal News for March 20, 1880, p. 226.

Again, it must be borne in mind that there is a wide difference between the action of county officials in consenting to the issue of bonds to a different road, or to the same road which the officials had been authorized to issue the bonds to, by the popular vote, but with a radical change in its organization or route, not authorized by the law in force when the vote was taken, and the action of the Legislature in consenting to such an issue of bonds.

The county officials do not possess the same authority over a county as the Legislature does.

If the representatives of the county who make the subscriptions and issue the bonds are "the officially constituted authorities" of the municipality (see 9 Otto, page 504), as the county commissioners and county clerk of Yankton County were, still, even then, they exercise simply a delegated authority.

Their action cannot be sustained, unless some power has been conferred upon them by the Legislature, the source whence comes all their authority.

The Legislature (where no constitutional provisions limit or restrict its authority) can authorize municipal officials to issue bonds without a popular vote at all, as we have seen. And hence Congress had the right and authority to make a radical change in the charter or route of the railroad company (which was not even authorized by any law at the time the vote was taken) and validate the vote of aid without any additional popular vote to the road, even with such amendment or addition to its charter.

A different question entirely is presented when the county agents, whether they are the "officially constituted authorities" of the county or not (where a popular vote is required, as was the case in 9 Otto, 504), attempt to validate a vote of aid to a railroad with a radical change in its charter and route.

We do not know of a single authority holding bonds illegal which have been validated by an act of the Legislature (unhampered by constitutional limitations), even though, after the vote, a radical change had taken place in the charter or route of the railroad company.

Such a decision would be contrary to the whole current of authorities in this court, upon the question of legislative power over municipal corporations.

But if this act of Congress did introduce a radical change in the road not authorized by the laws in force when the vote was taken, and contrary to the "conditions and stipulations" under which the citizens of that county were induced to vote said aid to it; and if the saving clause in the *proviso* to the act is not as broad as the change authorized by the act, and if the Congress of the United States had not the power (although unhampered by any constitutional limitations on the subject) to validate

the vote of aid without the consent of Yankton County, even then the bonds must be held valid, as the record in this case furnishes abundant evidence of that consent.

We shall refer hereafter to the facts which manifest the consent of Yankton County, and estop it from raising that point.

3. The next objection urged is that the act of Congress changed the vote of Yankton County from a *donation* to a *subscription*.

There would be more reason in this objection, it seems to us, if the county had voted to *subscribe* for stock, and Congress had, by the validating act, deprived her of this consideration, and authorized the bonds to be issued as a *donation*.

The act of Congress requiring the railroad company to issue to Yankton County full-paid certificates of stock, was for the *benefit of Yankton County*.

It was a duty imposed upon the railroad company. Without complying with this condition the railroad company did not have the right to demand the bonds.

But the act of Congress did not compel the county to *accept* the stock; or, if it did accept the stock it did not forbid it to surrender it to the railroad company.

The act simply provides that the railroad company "*shall issue* to the respective counties and townships "voting aid to said railroad, paid-up certificates of stock "in the same, in amounts equal to the sums voted by the "respective counties and townships."

A natural person may always waive any condition designed for his own benefit, and we fail to see any reason why this municipal corporation might not have waived and dispensed with even a tender of the stock.

In the case of the *County of Randolph* v. *Post*, 3 Otto, 513, this court said, when speaking of a waiver by the county officials in that case, of certain things which the railroad was under obligations to perform before it

could demand the issuing of the bonds, but which it did not perform, because the county waived the performance thereof:

"We should unreasonably restrict the rights and "powers of a municipal corporation, were we to hold that "it did not possess the power to alter its legally made "contract by waiving conditions found to be injurious to "its interests, or that it could not estop itself like other "parties to a contract. *Bigelow on Estoppel, 464; Moran* "v. *Comm'rs*, 2 Black, 722; *Zabriskie* v. *Cleveland*, 23 "How. 400; *Pendleton* v. *Avery*, 13 Wall. 297; *1 Dill. "Mun. Corp., secs. 375, 383, 385, 398.*"

Certainly Congress had the power to change or modify the terms upon which the county of Yankton had voted the aid; as, for example, to have lowered or even raised the rate of interest for the bonds, to have made the bonds payable at a longer or shorter period of time, provided the railroad company and Yankton County both consented to the change or modification.

Why, then, might not Congress change the donation to a subscription, provided both parties assented to it?

The record in the case at bar shows that the railroad company assented to and fully complied with the duty imposed upon it by the act of Congress, and that it did "issue to" the county full-paid certificates of stock for $200,000. The consent of Yankton County to the change is also clearly shown in the record. For the record shows that the county *accepted* the stock and *voted* it and used it to procure the appointment of a director in the railroad company in the interest of the county. Besides this, the county has brought suit upon the stock as a stockholder; and the record further shows that the county still holds the stock, although it has, with unconscionable inconsistency, repudiated the bonds which it gave as a consideration therefor!!!

IV.

COUNTIES IN DAKOTA WERE AUTHORIZED TO EXTEND AID TO "ANY ROAD," OR "ANY ENTERPRISE DESIGNED FOR THE BENEFIT OF THE COUNTY," BY THE ACT OF JANUARY 14, 1869, WHICH WAS PASSED AT A REGULAR SESSION OF THE DAKOTA LEGISLATURE, AND THE BONDS IN QUESTION ARE VALID OBLIGATIONS AGAINST YANKTON COUNTY, IN THE HANDS OF INNOCENT PURCHASERS, BY VIRTUE OF THE AUTHORITY CONFERRED UPON THE COUNTY BY THE PROVISIONS OF THAT ACT.

At the regular session of the Dakota Legislature in January, 1869, an act was passed entitled "An act relative to county commissioners and county clerks." It was approved and became a law January 14, 1869, and remained in force until February 17, 1877.

It is found on pages 168 to 179 of the Session Laws of Dakota of 1868–9.

The eighteenth section of that act is as follows:

"SEC. 18. The said commissioners shall have power "to submit to the people of the county, at any regular or "special election, whether the county will aid or construct "any road or bridge, or to submit to the people of the "county any question involving an extraordinary outlay "of money by the county; and said commissioners may "aid any enterprise designed for the benefit of the county, "as aforesaid, whenever a majority of the people thereof "shall be in favor of the proposition, as provided in this "section."

The 21st section provides: "When the question sub-"mitted involves the borrowing or expenditure of money, "the proposition of the question must be accompanied by "a provision to lay a tax for the payment thereof, in addi-"tion to the usual taxes under section fifteen of this chap-"ter, and no vote adopting the question proposed shall be "valid, unless it likewise adopt the amount of tax to be "levied to meet the liability incurred."

Section 22 provides "when the object is to construct, "or aid in constructing any road or bridge, the annual rate "shall not exceed one mill on a dollar of the valuation."

In *Riggs* v. *Johnson County*, 6 Wall. 166, this court held that a statute providing "That the county commis- "sioners of any county may submit to the people of it, at "any election, the question whether the county will aid to "construct any road which may call for extraordinary "expenditure," authorized the county to issue bonds in aid of a railroad entering the county.

A similar decision was made in the case of *Aurora City* v. *West*, 7 Wall., pp. 82–87. In this case the 18th section of the charter of the city authorized its council, whenever a majority of its qualified voters required it, to take stock in any chartered company for making "roads" to that city, and to make and sell their bonds to pay for it. With this power, the city of Aurora, in Indiana, issued $50,000 of bonds to a railroad. This court enforced the collection of the bonds, saying, on page 87: "Authority to subscribe for such stock, and to issue such "bonds under the conditions therein specified, is con- "ferred upon the corporation by the eighteenth section of "their charter."

Railways, as a matter of usage founded upon experience, are considered by the courts as in the nature of improved highways.

St. Joseph Township v. *Rogers*, 16 Wall. on page 663, per Mr. Justice CLIFFORD.

To same effect—

Olcott v. *The Supervisors*, 16 Wall. 694.

Railroad Company v. *County of Otoe*, 16 Wall. on page 673.

In the case of *Rogers* v. *Burlington*, 3 Wall. 654, this court held that the provision contained in the charter of the city of Burlington, granted by the Territorial Legislature of Iowa, providing "that whenever, in the opinion

" of the City Council, it is expedient to borrow money " for *any public purpose*, the question shall be submitted to " the citizens," etc., and " the loan shall not be made un- " less two-thirds of all votes polled at such election shall " be given in the affirmative," was broad enough to authorize the corporation to bind itself upon bonds issued in aid of a railroad entering the city. The bonds issued recited on their face that they were issued in aid of a railroad, and yet this court held them binding upon the city, because the issuing of bonds in aid of a *railroad* was borrowing money for a " public purpose."

We submit that the expression " may aid any enter- " prise designed for the benefit of the county," is fully as comprehensive as the expression " any public purpose."

See, as to the expression "*borrow money for any object in its discretion*,"

Meyer v. *City of Muscatine*, 1 Wall. 384.

And in *Seybert* v. *City of Pittsburg*, 1 Wall. 272, this court enforced bonds issued by a municipality under power conferred in these words, "*as fully as any individual*."

If we did not have any other legislative act to support these bonds, we submit this general act is sufficient.

The election which took place on the second day of September, 1871, when the county of Yankton voted to issue these $200,000 of bonds to aid the Dakota Southern Railroad Company, was conducted in all respects as this act of January 14, 1869, required; *unless it is held that a separate proposition to levy a tax to pay the bonds was necessary.*

In all other respects this election conformed strictly to the requirements of this general act of 1869.

The returns show that 543 votes were cast for and 126 against the issuing of the bonds. (*See p. 24 of Record.*)

The expression, "whenever a majority of the people thereof shall be in favor of the proposition," simply means a majority voting at such election.

See

St. Joseph Township v. *Rogers*, 16 Wall, 644, on page 664.

See, also,

County of Cass v. *Johnson*, 5 Otto, 360.

The language of the twenty-first section of this act of 1869, we submit, did not require the commissioners to submit to the people the question of whether a special tax should be levied to pay *time* bonds issued directly to aid "any road," or "any enterprise designed for the benefit of the county." (See section 24 of that act.)

This question did not involve the "expenditure of *money*." The county was not asked to lay a tax to raise a sum of *money* to aid the railroad. The county simply gave its obligations to the road.

Nor was this a "borrowing of money."

See

Gelpcke v. *City of Dubuque*, 1 Wall. 221, 223.

But even if this act of 1869 did require a vote upon the question of levying a tax to meet these bonds, and if the county commissioners did not comply with this provision, still that was simply an irregularity in the execution of a power which should not invalidate the bonds in the hands of an innocent purchaser. The Legislature granted the *power* to the county to issue bonds to aid a road under certain circumstances; and the plaintiff is an innocent purchaser for value, as the record shows. (*Page 60 of Record.*)

The County Commissioners of Yankton County were required by law to "superintend the fiscal concerns of "the county, and to secure their management in the best

"manner," (Sec. 16, p. 171, Laws 1868–9); and they possessed general authority in reference to the affairs of the county, "to institute and prosecute civil actions in the name of the county, for and on behalf the of county" (Sec. 14), "to make all orders respecting the property of the county," etc., etc. (see sec. 15, 9, 18, 29 and 36), and appeals could be taken from their decisions to the District Court. (See secs. 31–35 of same act.)

This record shows that on the 7th day of August, 1871, the County Commissioners of Yankton County ordered an election to determine whether $200,000 in bonds should be issued to aid the construction of the Dakota Southern Railroad Company. The order for the election did not require any separate vote to be taken upon the question of levying a tax to meet these bonds. But no appeal was taken from their decision ordering the election. (*See Record, pp. 23–24.*) September 2, 1871, the election occurred, and resulted in an overwhelming majority in favor of issuing the bonds.

November 8, 1871, the county commissioners decided to issue the bonds on certain conditions as to the time of completion of road, etc. (*See Record, pp. 25–27.*)

No appeal was taken from this decision.

January 2, 1872, the County Commissioners acceded to a modification of the time for the completion of the railroad, and the same day appropriated $1,100 out of the treasury to pay for engraving the bonds. (*Record, pp. 28, 29.*)

On the 28th day of May, 1872 (one day after the approval of the act of Congress), the Board of County Commissioners met and considered the proposition of the railroad company to issue $100,000 of the bonds; "but, "on motion, the said Board refrained from taking action "until legal advice be taken as to the mode of issuing the "bonds, and also for the further security of the said "county." (*Record, p. 29.*)

Afterwards, on the 9th of June, 1872, the Board met again, and considered the question of accepting from the railroad company a bond for $400,000, with approved sureties, requiring the railroad company to comply with the conditions imposed upon it with reference to time of completion, etc., etc., by the resolutions passed by the Board at its meetings on the 8th of November, 1871, and January 2, 1872. The result of the meeting was that the county demanded further security in the shape of a real estate mortgage.

June 11, 1872, the Board again met, and accepted as additional security another bond, secured by a real estate mortgage.

In the light of the objections now made by Yankton against these bonds, it is refreshing to read this additional bond "demanded" by Yankton County from the railroad company, before it would consent to issue any bonds. The bond is given by the "Dakota Southern Railroad Company, a corporation duly organized under the laws of the Territory of Dakota, and *recognized and declared to be a legal and valid corporation by act of Congress, approved May 27, 1872.*"

The condition reads thus:

"The condition of this obligation is such, that where-
"as a difference has heretofore arisen between the Dakota
"Southern Railroad Company and the said county of
"Yankton, in relation to their respective rights and
"obligations under the legislative enactment of the Terri-
"tory of Dakota and the act of Congress, bearing upon
"and having relation to the said Dakota Southern Rail-
"road Company, and the voting aid thereto by the
"several counties and townships of the said Territory; and,
"whereas, the said parties have since come to a mutual
"understanding and agreement in relation to the said
"rights and obligations thereunder, and for the purpose
"of setting out the same more fully and particularly, and

" of securing all of the said rights to the said county of " Yankton, do bind themselves firmly by these presents, " conditioned in effect, that the said railroad company " above named shall complete the said Dakota Southern " Railroad *from the terminus or station of some railroad* " *leading into the city of Chicago, Illinois*, to and within " the city of Yankton, as such limits existed on the 5th day " of August, 1871, by virtue of the charter of said city, and " in running order, constructed as well as the average of " Western roads, and trains of cars actually run thereon, " and with its track connected with some road so leading " to Chicago, of the same gauge, so as to give direct rail- " road communication between the city of Yankton and " Chicago, without necessitating the breaking of bulk or " transfer of freight at any such point of connection ; and " with further condition that said road shall be so comple- " ted and running on or before the first day of January, " 1873; and with further conditions that said Dakota South- " ern Railroad Company and their successors shall build, " construct, maintain and operate the general repair and " machine shops of the said company, and shall keep and " maintain the office and books of said company at and " within the city limits of said city of Yankton ; that said " Dakota Southern Railroad Company shall issue to Yank- " ton County, at the time of the issue of the two hundred " thousand county bonds, or any part thereof, an equal " amount of paid-up certificates of stock in said railroad " company, which shall not be subject to assessment, and " which said stock shall entitle said county to two thou- " sand votes and at least one director in the manage- " ment and control of said railroad ; that said Dakota " Southern Railroad Company, and their successors, shall " not continue said road westward from said city of " Yankton, *but shall make said city of Yankton its western* " *terminus for the time of two years from date hereof ;* and " in case of failure to comply with any of the above and

"foregoing conditions of said bond, each and every one "of which is made an essential part thereof, then and in "that event the damages arising from such failure and "omission is hereby liquidated at the amount of the face "of said county bonds so issued, with the interest thereon "accrued up to the time of recovery of judgment, and "ten thousand dollars additional to cover expenses of en- "graving, lithographing, and issuing of said bonds, "together with the costs and expenses of suit. But in "case of compliance with each and every of the conditions "and agreements herein named and enumerated, in spirit "and letter, according to its meaning and tenor, then this "instrument shall be null and void, otherwise of full force "and virtue." (*See Record, pp. 32-34.*)

It will be observed that by this obligation, which Yankton County "demanded" from the railroad company, it required the railroad company to extend its road eastward so as to connect with some road leading into Chicago, Illinois. This could only be done by extending the road to Sioux City, Iowa, as authorized by the act of Congress. This obligation further bound the railroad company not to extend its road westward for the space of two years.

At the same meeting it was—

"*Resolved*, That the Chairman of the Board of "County Commissioners and the County Clerk are hereby "authorized to issue to the President of Dakota Southern "Railroad Company, one hundred thousand dollars of "Yankton County bonds, voted in aid to said road, taking "his receipt for the same."

No appeal was taken from this decision and no injunction obtained by any one to restrain the Board from issuing the bonds, and thereupon the first $100,000 of bonds were issued.

The last $100,000 (the coupons in suit belong to this last batch of bonds) were issued about six months later. (*Record, p. 35.*)

If there was any illegality in the action of the county commissioners in issuing these bonds, why did not the county or some tax-paying citizen thereof restrain the commissioners from putting these negotiable instruments upon the market? Why did Mr. Treadway wait until after the road was built and the county had received a full consideration for the bonds, before filing his bill on which the county officers were perpetually restrained from paying these bonds?

There was abundant warning given. The first order was made more than ten months before any bonds were issued, and more than five months intervened between the time the Board passed the resolution agreeing to issue the bonds and the time the first $100,000 of bonds were issued.

In *Orleans* v. *Platt*, 9 Otto, 676, 682–683, the County Judge ordered certain parties, as commissioners, to issue the bonds. His authority to do this was denied on the ground that the consent of the requisite number of taxpayers was wanting. A *certiorari* was thereupon sued out by dissatisfied parties to the Supreme Court. From that court the case went to the Court of Appeals, where the decision of the County Court was overruled and set aside.

But during the interim the commissioners appointed by the County Court had issued the bonds, and this court held them good in the hands of an innocent purchaser, saying, pages 681–683: "In this case a preliminary in-" junction might and should have been procured, forbid-" ding the commissioners to issue the bonds, and the rail-" road company, if it received them, from parting with " them, until the case made by the *certiorari* was finally " brought to a close. This would have involved only an " ordinary exercise of equity jurisdiction. *State of Illi-" nois* v. *Delafield*, 8 Paige (N. Y.), 527; s. c. on appeal, " 2 Hill (N. Y.) 160. The omission was gross laches.

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" This negligence is the source of all the difficulties of the " plaintiff in error touching the bonds. The loss, if any " shall ensue, will be due not to the law or its adminis- " tration, but to the supineness of the town and the con- " testants. *County of Ray* v. *Van Sickle*, 96 U. S. 675."

" Where one of two innocent persons must suffer a " loss, and one of them has contributed to produce it, the " law throws the burden upon him and not upon the other " party. *Hern* v. *Nichols*, 1 Salk. 289; *Merchants' Bank* " v. *State Bank*, 10 Wall. 604."

* * * * * * *

" This court has uniformly held, when the question " has been presented, that where a corporation has lawful " power to issue such securities, and does so, the *bona-* " *fide* holder has a right to presume the power was prop- " erly exercised, and is not bound to look beyond the " question of its existence."

* * * * * * *

"A corporation is liable for the acts of its servants " while engaged in the business of their employment, to " the same extent that individuals are liable under like " circumstances. *Philadelphia, Wilmington & Baltimore* " *Railroad Co.* v. *Quigley*, 21 How. 209; *Greene* v. *Lon-* " *don Omnibus Co.*, 8 C. B. N. S. 290; *The Life and Fire* " *Insurance Co.* v. *Mechanics' Fire Insurance Co. of New* " *York*, 7 Wend. (N. Y.) 31."

* * * * * * *

" The county judge was the officer charged by law " with the duty to decide whether the bonds could be " legally issued, and his judgment was conclusive until " reversed by a higher court. *Lynde* v. *The County*, 16 " Wall. 6; *Township of Rock Creek* v. *Strong*, 96 U. S. " 271."

In *Bissell* v. *City of Jeffersonville*, 24 How. 299, this court said, in reference to the objection urged against the bonds in that case, that the municipal board had, in their

action, failed to conform to the provisions of the law authorizing the municipality to issue bonds in aid of a road.

"Perfect acquiescence in the decision and action of "the board seems to have been manifested by the defend- "ants until the demand was made for the payment of "interest on the loan. So far as appears, they never "attempted to enjoin the proceedings, but suffered the "authority to be executed, the bonds to be issued, and "to be delivered to the railroad company, without inter- "ference or complaint."

"When the contract had been ratified and affirmed, "and the bonds issued and delivered to the railroad com- "pany in exchange for the stock, it was then too late to "call in question the fact determined by the Common "Council, and, *a fortiori*, it is too late to raise that ques- "tion in a case like the present, where it is shown that the "plaintiffs are innocent holders for value."

To the same effect see

Rogers v. *Burlington*, 3 Wall. on page 667.

In *Mayor* v. *Lord*, 9 Wall., on page 414, the same rule is laid down by this court in the following language:

"It is not denied that the relator was an innocent "purchaser. In that event, if the bonds could have been "properly issued under any circumstances, he had a right "to presume they were so issued, and as against him the "city is estopped to deny their validity. (*Aurora City* v. "*West*, 7 Wallace, 82; *Beloit* v. *Morgan*, Id. 619; *Meyer* "v. *The City of Muscatine*, Id. 393; *Mercer County* v. "*Hackett*, Id. 93; *Van Hostrup* v. *Madison City*, Id. 297; "*Supervisors* v. *Schenck*, 5 Id. 784.)"

To same effect see

Cromwell v. County of Sac, 6 Otto, 51.

2 Daniels' Neg. Inst., § *1537*, and cases there cited.

In *San Antonio* v. *Mehaffy*, 6 Otto, on page 314, this court said:

"The holder of commercial paper, in the absence of "proof to the contrary, is presumed to have taken it un- "der due for a valuable consideration, and without "notice of any objection to which it was liable. 2 *Pars.* "*Bills and Notes*, 9; *Pinkerton* v. *Bailey*, 8 Wend. (N. "Y.), 600."

"There is certainly nothing in the record which shows "that such is not the position of the defendant in error."

"This shuts the door, as matter of law, to all inquiry "touching the regularity of the proceedings of the officers "charged with the duty of subscribing and making pay- "ment in the way prescribed. The rule in such cases is, "that if the municipality could have had power, under "any circumstances, to issue securities, the *bona-fide* "holder has a right to presume they were issued un- "der the circumstances which give the authority, and they "are no more liable to be impeached in his hands for any "infirmity than any other commercial paper. *Supervisors* "v. *Schenck*, 5 Wall. 772; *San Antonio* v. *Lane*, 32 Tex. "405."

In *County of Macon* v. *Shores*, 7 Otto (decided in 1877), on pages 278–9, this court said: "This court has "repeatedly held that where a corporation has power "under any circumstances to issue such securities, the "*bona-fide* taker has a right to presume they were issued "under circumstances which gave the requsite authority, "and that they are no more liable to be impeached for "any infirmity, in the hands of the holder, than any other "commercial paper. *Supervisors* v. *Schenck*, 5 Wall. "772." * * * * *

"Where a loss is to be suffered through the miscon- "duct of an agent, it should be borne by those who put it "in his power to do the wrong, rather than by a stranger.

" *Hern* v. *Nichols*, 1 Salk. 289; *Merchants' Bank* v. *State*
" *Bank*, *supra*."

Again, Yankton County ratified the action of the County Board in issuing these bonds, by accepting and voting upon and suing upon the stock given in exchange for the bonds.

She has exercised all her rights as a stockholder and director of the road (*See Record*, *pp. 34, 54, 55*), and not content with that, in 1873 she filed a bill as a stockholder against the railroad company, just as the company were ready to execute a mortgage upon the road, and by obtaining an injunction *in limine*, forced the company to accede to new demands made upon her by Yankton County. (*See Record*, *pp. 42–56.*)

The sworn complaint on which the injunction was granted, stated that the county had become a stockholder in the road by issuing her bonds to the amount of $200,000, " in payment for the stock now held by this plaintiff." (*See Record*, *pages 43, 47, 50.*)

By this legal proceeding, *commenced at such an opportune time*, the county succeeded in securing an agreement from the railroad company, with sureties, binding the company, among other things, to " erect and maintain at the city of Yankton, in said county, its round-" house for engines, all necessary and suitable passenger " and freight depots, its principal machine shops for the " manufacture and repair of its rolling stock and other " machinery, and shall place in such machine shops all " proper and suitable machinery for such purpose." That the improvements so to be made should cost at least $50,000; that the company should run a daily passenger train to and from Yankton, at certain times of the day specified in the agreement, etc., etc. If the company failed to keep the agreement, it was to pay $50,000 as liquidated damages. (*See Record*, *page 56.*) This agreement was ratified by a decree of the court.

And yet Yankton County asks this court to relieve her from the payment of the bonds given for that stock!!!

The twenty-sixth finding of fact also throws a flood of light upon the conduct of Yankton County in connection with the bonds, and the trust money coming into her treasury to meet the maturing interest upon those bonds. We copy it entire:

"26. In the years 1872, 1873, 1874 and 1875, the "county of Yankton levied a tax to pay interest on said "railroad bonds, given to the Dakota Southern R. R. "Co. That $39,624.90 of said railroad tax has been col- "lected by the proper authorities of said county. That "only $25,800 of said coupons have been redeemed by "said county, which were taken in payment for railroad "tax, no money being paid to redeem the same. *That "the balance of money so raised has been used for other "purposes.*"

These facts, we respectfully submit, under the rulings of this court in other cases, estop the county of Yankton from disputing her liability upon these bonds in the hands of an innocent purchaser, on any ground of irregularity in the exercise of the power to issue bonds vested in the county commissioners. And this rule does not rest upon any *recitals* contained in the bonds issued.

In *Supervisors* v. *Schenck*, 5 Wall. 772 (decided in 1866), this court held bonds binding upon a municipality *which contained, so far as the pleadings or the record showed, no recitals of conformity to the law granting the power*, although the law authorizing the issue of the bonds had not been conformed to. There had been a *very defective* attempt to exercise the power. The election which was necessary before the bonds could be issued, was called by the county court, instead of being ordered by the board of supervisors, who alone had the power to call a legal election, but the county had held the stock received for the bonds and levied a tax to pay the interest

on the bonds for a number of years, and this was held to estop the county from disputing its liability upon the bonds.

In that case the court said, pages 780–784: "Throughout they appear to have adopted the order and "the results of the election as rightfully authorized acts, "and for the period of ten years the county has held the "stock as their own property, and have voluntarily enjoyed "all the benefits of absolute legal ownership, without "any complaint or any attempt to enjoin the proceedings."

"Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined "for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be "forever concluded, if they remain silent and suffer the "shares to be purchased, the bonds to be issued, and the "securities to be exchanged. Nothing of the kind was "attempted in this case, and the defendants have never "rescinded, or attempted to rescind, the contract, and "have never returned, or offered to return, the evidences "of their ownership of the shares in the stock of the "company, but have annually acknowledged the validity "of the bonds, by voting taxes for the payment of the "accruing interest, and have actually paid the same to "the amount of six thousand dollars."

"Judge STORY said there was no maxim, where it "does not prejudice the rights of strangers, better settled "in reason and law, than *Omis ratihabitio retrotrahitur et "mandato priori acquiparatur*, and it is equally well "settled that the maxim is as applicable to corporations "in matters of simple contract as to other contracting "parties. Questions of ratification most frequently arise "in respect to the acts or omissions of agents, but the "general rule is the same in all cases, where the act done "was one which it was competent for the party attempted "to be charged to do. When the principal, upon a full

"knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings or omissions reach." (*Story on Agency, Ed. 1863, § 239; Fleckner* v. *United States Bank*, 8 Wheaton, 363; *N. Y. & N. H. R. R. Co.* v. *Schuyler et al.*, 34 New York, 49.)

"Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed, or if the contract was illegal, immoral or against public policy. Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption. (*Hoyt* v. *Thompson*, 19 New York, 218.) Such ratification may be by express consent or by acts and conduct of the principal, inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name; and it was held in *Peterson* v. *The Mayor of New York*, 17 Id. 453, that the principle is as applicable to corporations as to individuals. Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed." (*Bank of United States* v. *Dandridge*, 12 Wheaton, 70.)

"All the acts of the Board of Supervisors of the county, in making the subscription, purchasing the shares, issuing the bonds, and exchanging the securities, appear to have been open and well known to the corpora-

" tion; and yet they constantly suffered themselves to be " represented in the choice of officers, and in the manage- " ment of all the affairs of the railroad company, and have " voluntarily voted taxes for the payment of the yearly " interest on the bonds, *and actually paid the same*, as " admitted in the special plea.

" Examined in the light of those suggestions, it would " be difficult to imagine a case where the rule that a sub- " sequent ratification is as good as a previous authority " can be more justly applicable than in the case under " consideration. (*Mills* v. *Gleason*, 11 Wisconsin, 490; " *Angell & Ames on Corporations, 8th Ed., §§ 237, 304;* " *2 Kent's Commentaries, 11th Ed., 348; Bissell* v. *Rail-* " *road*, 22 New York, 264.) So where shares in a rail- " road company were received by the officers of a county " in exchange for their bonds, and were never returned, " and the proper officers of the county voted for directors " at two elections, and the supervisors paid two annual " installments of interest, the Supreme Court of Illinois " held that those acts, unexplained, were as satisfactory " evidence of a design to ratify the issue of the bonds as " if it had been done by an order of the supervisors." (*Johnston* v. *Stark Co.*, 24 Illinois, 90.)

Direct decision to the same effect was also made by " that court in *Keithsburg* v. *Frick* (34 Id. 421), which is the " latest reported decision upon the subject. Views of the " court in that case were that the acts of the supervisors in " issuing the bonds and putting them upon the market, and " by levying taxes and paying interest for a series of years, " estopped the county from setting up any irregularity in " their issue, and this court has, in repeated instances, " affirmed the same doctrine."

" Leading case in this court is that of *Knox County* v. " *Aspinwall* (21 Howard, 544), which was very fully consid- " ered by the court. Alleged defect in that case was that the " notices of the election, as required by law, had not been

" given in any form, but the decision was that the question " as to the sufficiency of the notice, and the ascertainment " of the fact whether the majority of votes had been cast " in favor of the subscription, was necessarily left to the " inquiry and judgment of the county board, as no other " tribunal was provided for the purpose. Intimation of " the court was that their decision might not be conclusive " in a direct proceeding to inquire into the facts previously " to the execution of the power, and before the rights and " interests of third parties had attached. But the court " held, that after the authority had been executed, the " stock subscribed, the bonds issued and in the hands of " innocent holders, it was too late, *even in a direct pro-* " *ceeding*, to call the power in question; much less, say " the court, can it be called in question to the prejudice of " a *bona-fide* holder of the bonds in a collateral way."

" Similar views were expressed by this court in the " case of *Bissel* v. *Jeffersonville*, 24 Id. 299, and in many " others referred to by the plaintiff. (*Moran* v. *Miami* " *Co.* 2 Black. 725.) When a corporation has power, " under any circumstances, to issue negotiable securities, " the decision of this court is that the *bona-fide* holder has " a right to presume they were issued under the circum- " stances which give the requisite authority, and they are " no more liable to be impeached for any infirmity in the " hands of such a holder than any other commercial " paper." (*Gelpcke* v. *Dubuque*, 1 Wallace, 203.)

In *Pendleton County* v. *Amy*, 13 Wall. 298, this court decided that a county was estopped against showing that no popular election whatever was taken (even though the statute required this) by the simple fact that it had taken and held the stock of the railroad company in payment for which the bonds were issued

This court said, pages 304-306:

" It is to be noticed at the outset that the plea con- " cedes legislative authority to the county to make a

" subscription and to issue bonds in payment, though the " exercise of the authority was required to be preceded " by a popular vote. It concedes that the bonds were, in " fact, made and issued. We say it concedes this, because " such making and issue are alleged in the declaration, " and the plea does not traverse the allegation. It con- " cedes that the subscription was made; that the bonds " were delivered to the company in payment; that they " were sold for $50,000; that the plaintiff subsequently " became the owner, and hence, that he stands in the " position of a purchaser for value; and it concedes that " the county obtained for the bonds a certificate of stock in " the railroad company, which it now holds."

" Without legislative authority, a municipal corpora- " tion, like a county, may not subscribe to the capital " stock of a railroad company, and bind itself to pay its " subscription, or issue its bonds in payment; and if it " does, the purchase of such bonds is affected by the want " of authority to make them. But it does not follow from " this that when the Legislature has given its sanction to " the issue of bonds, provided that before their issue " certain things shall be done by the officers, or the peo- " ple of the county, the bonds can *always* be avoided in " the hands of an innocent purchaser by proof that the " county officers, or the people, have not done, or have " insufficiently done, the things which the Legislature re- " quired to be done before the authority to subscribe, or " to issue bonds, should be exercised. A purchaser is " not always bound to look farther than to discover that " the power has been conferred, even though it be coupled " with conditions precedent. If the right to subscribe be " made dependent upon the result of a popular vote, the " officers of the county must first determine whether the " vote has been taken as directed by law, and what the " vote was. When, therefore, they make a subscription and " issue county bonds in payment, it may fairly be presumed

" in favor of an innocent purchaser of the bonds, that the " condition which the law attached to the exercise of the " power has been fulfilled. To issue the bonds without " the fulfillment of the precedent conditions, would be a " misdemeanor, and it is to be presumed that public offi- " cers act rightly. We do not say this is a conclusive " presumption in all cases, but it has more than once been " decided that a county may be estopped against asserting " that the conditions attached to a grant of power were " not fulfilled. (Commissioners of Knox County v. As- " pinwall et al., 21 Howard, 539; Bissell v. City of Jef- " fersonville, 24 Id. 287; Moran v. Commissioners, 2 " Black, 722; Meyer v. Muscatine, 1 Wallace, 384; Van " Hostrup v. Madison City, 1 Id. 291; Supervisors v. " Schenck, 5 Id. 722.) The estoppel in these cases was " either by recital in the bonds that the conditions prece- " dent had been complied with, or by the fact that the " county had subsequently levied taxes to pay interest on " the bonds. In the present case it does not appear in " the pleadings whether or not the bonds *contained any* " *such recitals*, nor whether the officers of the county have " levied taxes to pay interest on them, or whether any in- " terest has been paid. These grounds of estoppel do not " exist. But if such acts and such recitals are sufficient to " protect *bona-fide* purchasers against an attempt to set up " non-compliance with the conditions attached to the " grant of power to issue the bonds, it is not easy to see " why the pleadings do not show an estoppel in this case. " The county received, in exchange for the bonds, a cer- " tificate for the stock of the railroad company, which it " held about seventeen years before the present suit was " brought, and which it still holds. Having exchanged " the bonds for the stock, can it retain the proceeds of " the exchange, and assert against a purchaser of the bonds " for value, that though the Legislature empowered it to " make them, and put them upon the market upon certain " conditions, they were issued in disregard of the condi-

" tions? We think that they cannot, and, therefore, that " the third plea cannot be sustained."

This case has never been overruled and the principle decided by it has been again and again recognized by this court.

See *County of Ray* v. *Vansycle*, 6 Otto, on page 688, per Mr. Justice HARLAN.

In *Commissioners* v. *January*, 4 Otto, 202, 206, this court held that the reference in the bonds to the wrong statute, and not the statute under which the power was conferred, did not render the bonds invalid, and that the taking and holding of the stock of the railroad company estopped the county from insisting upon any irregularity in the vote, saying, page 206: " Taking and holding the " certificate of stock, issuing and delivering the bonds, " and paying the interest for a time, cured the defect as to " the order for an election, if any such existed. Under the " circumstances a *bona-fide* taker had a right to presume " that everything had been properly done which was " necessary to the validity of the bonds. When this suit " was instituted, the objections which have been made " were too late."

" The views we have expressed have been repeatedly " sustained by the adjudications of this court. (*Supervisors* " v. *Schenk*, 5 Wall. 772; *Olcott* v. *The Supervisors*, 16 " Id. 698; *City of Lexington* v. *Butler*, 14 Id. 385; " *Pendleton County* v. *Amy*, 13 Id. 298; *Meyers* v. *Mus-* " *catine*, 1 Id. 385; *Knox* v. *Aspinwall*, 21 How. 544; " *Lind* v. *The County*, 16 Wall. 6; *St. Joseph Township* " v. *Rogers*, Id. 644; *Pine Grove* v. *Talcott*, 19 Wall. " 666.)

" We refer especially to the closing part of the " opinion in the case last mentioned."

The "closing part of the opinion" in the case of *Township of Pine Grove* v. *Talcott*, 19 Wall. 678, is this:

" In Sedgwick on Statutory and Constitutional Law

" (page 90), it is said : ' It must be borne in mind further that " the invalidity of contracts made in violation of statutes is " subject to the equitable exception, that although a corpo- " ration in making a contract acts in disagreement with its " charter, while it is a simple question of capacity or author- " ity to contract arising either on a question of regularity " of organization or of power conferred by the charter, a " party who has had the benefit of the agreement cannot " be permitted, in an action founded on it, to question its " validity. It would be in the highest degree inequitable " and unjust to permit the defendant to repudiate a con- " tract, the fruits of which he retains, and the principle " of this exception has been extended to other cases. So " a person who has borrowed money of a savings institu- " tion upon his promissory note, secured by a pledge of " bank stock, is not entitled to an injunction to prevent " the prosecution of the note, upon the ground that the " savings bank was prohibited by its charter from making " loans of that description. The authorities referred to " sustain the text. (*Palmer* v. *Lawrence*, 3 Sandford's S. " C. 162 ; *Steam Navigation Co.* v. *Weed*, 17 Barbour, " 378 ; *Chester Glass Co.* v. *Dewey*, 16 Massachusetts, " 94 ; *Steamboat Co.* v. *McCutcheon*, 13 Pennsylvania " State, 13 ; *Potter* v. *The Bank of Ithaca*, 5 Hill, 490 ; " *Suydam* v. *Morris Canal and Banking Co.*, Ib. 491 ; " *Sackett's Harbor Bank* v. *Lewis County Bank*, 11 Bar- " bour, 213 ; *Mott* v. *United States Trust Co.*, 19 Id. " 568.)"

V.

THE ACT OF THE DAKOTA LEGISLATURE OF DECEMBER 21, 1872, AUTHORIZING YANKTON COUNTY TO BORROW MONEY "TO BE USED ONLY TO MEET THE INTEREST ON THE BONDS VOTED BY YANKTON COUNTY IN AID OF THE DAKOTA SOUTHERN RAILROAD COMPANY," SUPPLIED ANY LACK OF POWER, IF ANY EXISTED.

At the regular session of the Dakota Legislature in the winter of 1872, the Legislature passed an act entitled "An act to authorize the County Commissioners of Yank-"ton County to borrow money in certain cases."

It was approved December 21, 1872, and is published on page 130 of the Session Laws of Dakota for 1872-3. It is as follows:

"SECTION 1. That the County Commissioners of "the county of Yankton be and are hereby authorized to "borrow any amount of money, not to exceed in any one "year over eight thousand dollars, and for a time not to "exceed twelve months. Said money to be used only to "meet the interest on the bonds voted by Yankton "County in aid of the Dakota Southern Railroad, and "for no other purpose, and to draw no higher interest "than allowed by law in other cases.

"SEC. 2. It shall be lawful for the County Com-"missioners to issue railroad interest warrants, drawing "interest at the rate of (10) ten per cent. per annum, not "to exceed eight thousand dollars in the aggregate in "any one year, the same being receivable by the County "Treasurer for railroad tax.

"SEC. 3. This act shall take effect and be in force "from and after its passage and approval."

This record shows "that said Yankton County never "voted or attempted to vote any other aid to the Dakota "Southern Railroad Company, or any other railroad com-"pany than that hereinbefore specified." "That there is

" no other railroad in said Territory known or called the " ' Dakota Southern Railroad Company,' except the com- " pany hereinbefore mentioned." (See special finding No. 31, page 59 of Record.)

Many of the statutes which have been held by this court to have the effect to validate prior unauthorized action on the part of a municipal corporation in voting for an issue of bonds in aid of a railroad, were evidently not passed for the purpose of accomplishing what this court held they did accomplish. The acts were passed with some other object in view. Yet, as the acts contained words which clearly referred to the bonds *as legal obligations binding upon the county*, that was held sufficient. See *Gelpcke* v. *Dubuque*, 1 Wall. 220.

The curative act in that case simply contained this reference to the bonds: Whenever " any company shall have " received, or may hereafter receive, the bonds of any city " or county, upon subscription of stock by such city or " county, such bonds may bear an interest at a rate not ex- " ceeding 10 per cent., and may be sold by the company " at such discount as may be deemed expedient." And further: " The provisions of this act shall apply to any " railroad bonds which have been heretofore issued, as well " as to those which may hereafter be issued." This court held this amounted to a sufficient granting of authority, saying, page 221: " In this act it is clearly implied tha " cities have authority to subscribe for railroad stock, and " to issue their bonds in payment of it. What is implied " in a statute is as much a part of it as what is expressed. " (*United States* v. *Babbitt*, 1 Black. 61.) Considering " the subject in the light of these acts, we entertain no " doubt that the city possessed the power to issue these " bonds."

In *City* v. *Lamson*, 9 Wall. 478, 485, the curative statute was contained in an amendment to the charter of the city, which simply made this reference to the bonds

which this court held were thereby legalized: "The Com-
"mon Council of the city of Kenosha should have gener-
"ally the charge of all interest the city of Kenosha *now*
"*has or may hereafter have* in that railroad." The act then provided that the Common Council should appoint a railroad commissioner, that when duly appointed he should be *ex officio* a member of the board of directors of the railroad; and a statute of 1862 authorized the city to "issue "new bonds, in exchange for the bonds and scrip *hereto-*
"*fore* issued by said city on railroad account, now out-
"standing and unredeemed, for the purpose of compro-
"mising *the indebtedness* of said city on such terms as may
"be agreed upon between the city and its *creditors*."

This court said, page 485: "The only remaining
"question in the case is as to the authority of the city of
"Kenosha to issue bonds to which the coupons were an-
"nexed. The act of 1857 of the Legislature, which
"amends and consolidates the several acts relating to the
"charter of the city, confers full authority upon the Com-
"mon Council to borrow, on the corporate credit of the
"city, any sum of money, for any term of time, at any
"rate of interest, and payable at any place deemed expe-
"dient, issuing bonds or scrip therefor. It is admitted
"this authority would be sufficient, but it is insisted that
"the statute exceeds the authority of the Legislature un-
"der the third section of the eleventh article of the State
"Constitution, which, it is asserted, requires the Legisla-
"ture to limit or restrict the amount of money to be raised
"by the city. Without inquiry into this question, it is
"sufficient to say that, after the city had passed the ordi-
"nance lending its credit to the railroad company to the
"amount of $100,000, the Legislature ratified it. This
"was equivalent to an original limit of this amount."

See, also,

Ritchie v. *Franklin County*, 22 Wall. 68.

New Orleans v. *Clark*, 5 Otto, 644, 648, 653, 654.

If the *assent* of Yankton County was needed after this act of December 21, 1872, to give effect to the legislative purpose to treat these bonds as the valid obligations of Yankton County, we find that assent expressed in the levy of taxes made by the county to meet the interest on the bonds in the years 1873, 1874 and 1875. And the conduct of the county in reference to the stock taken in exchange for the bonds. The last batch of bonds, amounting to $100,000, numbered from 101 to 200, inclusive, were not delivered by the county to the railroad company until after this act of December 21, 1872, had been approved.

In this case Yankton County has received an adequate *quid pro quo* for her bonds. She received $200,000 of full-paid stock, which she still holds; and by the issue of the bonds she was enabled, not only to obtain railroad communication with the outer world, which resulted in immediately enhancing, to a great extent, the value of the lands lying within her borders, and has ever since then added largely to the value of her annual productions, but she also thereby acquired the power (which she has not been slow to exercise) to *dictate* to the railroad company *how and when* the road should be constructed; what terminal connections it should form; that its general offices and engine house and machine shops should be located at Yankton; that $50,000 should be expended therein in erecting improvements; that the railroad company should make Yankton its western terminus for two years; the time of running its passengar trains, and other matters relating to the management of the road, which affected the interests and comfort of the citizens of Yankton County.

In conclusion we will simply quote the language of Mr. Justice STRONG in delivering the opinion of this court in the case of *Commissioners* v. *Bolles*, 4 Otto, on page 110, which we think, with slight variations, may very appropriately be applied to this case.

"The case is not one in which the municipality has "incurred a debt, without securing the object sought by "it. Popular votes approved the issue of the bonds to "further construction of the railroad, which has been "completed, and which the county now enjoys. The bonds "have not been misappropriated or squandered. They "have been applied to the purpose for which they were "made. By direction of the county they were paid to "the contractor (railroad company) who built the road, "after his contract (the road) was completed, and, as "intended, they have gone into the hands of remote pur-"chasers. In addition to this the county received in "exchange for them an equal amount of stock of the "railroad company. So far as appears it holds that stock "still. It has acted as the owner by assenting to a con-"solidation of the company with another (by assenting to "vote with and sue upon the stock so acquired). Com-"mon honesty demands that a debt thus incurred should "be paid."

Respectfully submitted for the appellant,

S. W. PACKARD.

CHICAGO, April 1, 1880.

SUPPLEMENT.

Dissenting opinion of Chief Justice SHANNON in the case of *Treadway* v. *Schnauber*, wherein the majority of the Supreme Court of Dakota Territory held these bonds null and void. The case is reported in 1 Dakota R. 236.

"CHIEF JUSTICE SHANNON, DISSENTING: The com- "plaint alleges the illegality and invalidity of a tax, des- "ignated as 'the railroad tax,' levied to pay the interest "on bonds to the amount of two hundred thousand dol- "lars, issued by the commissioners of the county and de- "livered to the Dakota Southern Railroad Company.

"The said bonds were issued and delivered in pursu- "suance of the following: First, of an act of the Territorial "Assembly, passed at an extra session, on April 21, 1871, "the illegality of which session is asserted; secondly, of "an election held in September following, at which a ma- "jority of those then voting, voted to extend the aid of "the county to the said railroad, by a donation to the "amount aforesaid, in bonds of the county, payable in "twenty years, with interest; and, thirdly, of an act of "Congress, approved May 27, 1872, entitled 'An act in "relation to the Dakota Southern Railroad Company,' "which validated the provisions of the Territorial act, so "far as the same authorized any vote of aid and subscrip- "tion to said railroad.

"In his complaint the plaintiff prays that said railroad "tax, levied on his property, may be declared illegal and "void, and that the county and its agents may be per- "petually enjoined from proceeding to collect such tax.

"The defendants demurred to the complaint, for that "it 'does not state facts sufficient to constitute a cause of "action.'

"The court below sustained the demurrer, and gave "judgment that the complaint be dismissed. The plaintiff "appealed.

"By the organic law of the Territory, of March 2, "1861, it was declared that the legislative power shall ex- "tend to all rightful *subjects* of legislation consistent with "the Constitution of the United States and the provisions "of that act; but no law shall be passed interfering with "the primary disposal of the soil; no tax shall be imposed "upon the property of the United States; nor shall the "lands or other property of non-residents be taxed higher "than lands or other property of residents; nor shall any "law be passed impairing the rights of private property; "nor shall any discrimination be made in taxing different "kinds of property; but all property subject to taxation "shall be in proportion to the value of the property taxed.

"This law was formed upon the model of the famous "ordinance of Congress of the 13th of July, 1787, which "has ever since constituted, in most respects, the model "of all our Territorial governments.

"On the 6th of January, 1868, the Legislative As- "sembly of this Territory, at a regular and lawful session, "passed a general incorporation act, entitled 'An act to "regulate incorporations,' which, among other things, pro- "vided for the incorporation of railroad companies. Under "it, the Dakota Southern Railroad Company, in or about "April, 1871, became organized, for the construction of a "railroad from Sioux City, Iowa, to the city of Yankton, "the capital of this Territory.

"On the 21st of April, 1871, the Governor of the "Territory approved an act, entitled 'An act to enable "organized counties and townships to vote aid to any rail- "road, and to provide for the payment of the same.

"In the following autumn, to wit: On the 2d day of "September, 1871, in pursuance of said last enactment, at "an election then held, a majority of the voters of Yank-

" ton County voting on that day, decided to grant a dona-
" tion of two hundred thousand dollars to aid the said rail-
" road company, in bonds of said county, payable in
" twenty years, bearing eight per cent. interest, the in-
" terest payable semi-annually. But doubts arose to the
" above legislation.

" In the first place, although the organic act had con-
" ferred on the Assembly legislative power co-extensive
" with all rightful subjects of legislation, not inconsistent
" with the Constitution and that act, yet Congress on
" March 2, 1867, enacted that the Legislative Assemblies
" of the several Territories shall not grant private charters
" or special privileges, with the exception, however, that
" they may, by general incorporation acts, permit persons
" to associate themselves together *as bodies corporate*, for
" *mining, manufacturing, and other industrial pursuits.*

" This last-named act of Congress created the doubt
" as to the validity of the Territorial act of January 6,
" 1868, in relation to the incorporation of railway com-
" panies.

" In the next place, the validity of the Territorial act
" of April 21, 1871, was questioned. The regular session
" of the Assembly was over. It had convened on the 5th
" of December, 1870, and had concluded its allotted term
" of forty days on the 13th of January, 1871. The mem-
" bers of that regular session had been chosen for the term
" of two years, and the sessions could only be biennial.
" The session in April was an extraordinary one; it had
" been called by a proclamation of the acting Governor;
" and his right to do so was doubted or denied.

" In this juncture of affairs, Congress was appealed to,
" and its power invoked to ratify transactions performed
" under color of said Territorial enactments. In other
" words, Congress was asked to make a law to cure all de-
" fects of power in said enactments passed by the direct or
" reputed representatives of the people, and to heal all ir-
" regularities.

" Accordingly, Congress on May 27, 1872, enacted a " law entitled—(Here follows the act of Congress.)

" Very shortly thereafter, to wit: on the 10th day of " June, 1872, it passed another curative act, as follows: " 'That the first section of an act, approved March 2d, " 1867, entitled An act amendatory of 'An act to provide " a temporary government for the Territory of Montana,' " approved May 26, 1864, so far as relates to *incorpora-* " *tions which have been*, or which may hereafter be, created " and organized for the business of mining, manufactur- " ing, or other industrial pursuits, or the construction or " operation of railroads, wagon roads, irrigating ditches, " and the colonization and improvement of lands in " connection therewith, or for colleges, seminaries, " churches, libraries, or any benevolent, charitable, or " scientific association, and for all rightful subjects of leg- " islation consistent with the Constitution of the United " States, under the general incorporation laws of any Ter- " ritory of the United States, *shall be construed as having* " *authorized*, and as authorizing the Legislative Assem- " blies of the Territories of the United States, *by general* " incorporation acts, to permit persons to associate to- " gether as bodies corporate for purposes above named.'

" After the passage of these acts of Congress, *i. e.*, " on the first day of July, 1872, the Board of County Com- " missioners of Yankton County, acting in behalf of the " county, executed bonds of the county to the amount of " two hundred thousand dollars, payable twenty years " after that date, bearing interest at the rate of eight per " cent. per annum, payable semi-annually, and which in- " terest is represented by coupons attached to the bonds, " which bonds were afterwards, and during that year and " the year 1873, issued and delivered to the railroad com- " pany, in pursuance of the said disputed Territorial en- " actment of April 21, 1871, and of the said legislation by " Congress.

"It is nowhere alleged that the election held on the "second day of September, 1871, was not held or con- "ducted in the manner and according to the directions "prescribed in the enactment of April 21, 1871. There "is no charge of unfairness or fraud as respects the elec- "tion. It is admitted that a majority of the electors "voting at said election, did vote to extend the aid of the "county to that railroad company, by a donation or gift "to the said amount, and that the bonds of the county "should be issued therefor, the principal to be payable in "twenty years, and the interest of eight per cent. payable "semi-annually.

"The enactment of April 21, 1871, was a general one, "applicable to all organized counties and townships in the "Territory; and the fifth section thereof declares that 'if "a majority of the electors, voting at such election, vote "for the issue of bonds, the board of county commission- "ers shall cause such bonds as may be required by the "terms of said vote, to be issued and delivered in accor- "dance with section second of this act, in the name "of such county or township, to be signed by the chair- "man of the board of county commissioners, and attested "by the register of deeds, under the seal of the county.' "And the sixth section is this—'whenever any bonds shall "be issued in pursuance of the foregoing provisions, it "shall be the duty of the board of county commissioners "annually to proceed to levy and collect a tax on all tax- "able property of the county or townships voting such "tax, sufficient to pay the interest on said bonds: *Pro- "vided*, that no more than two per cent. of the assessed "valuation of the property in any county or township "shall be raised in any one year, under the provisions of "this law, either for the payment of interest or bonds.' "The next sections provide for a sinking fund, and for the "collection of the tax as county taxes are collected, and "payment by the treasurer on presentation of the coupons, "etc.

"It is alleged that the session of the Assembly, at "which the act of April 21, 1871, was passed, was wholly "without authority of law; secondly, that the act itself "was and is wholly illegal, nugatory and void; thirdly, "that the vote of aid, and all proceedings thereunder, are "and were inoperative and void; fourthly, that the said "railroad company is a private corporation organized and "operated solely for private gain; and, fifthly, that the act "of Congress of May 27, 1872, so far as it operates to "validate or authorize the taking of property by taxation "or otherwise, for the benefit of said corporation, is in-"valid and of no binding force or effect.

"A solution of these objections may be reached by "considering their main features. And in the first place, "it is a well-established principle, that debts contracted by "municipal corporations must be paid, if paid at all, out of "taxes which they may *lawfully* levy; and that all contracts "by them, creating debts to be paid in future (not limited "to payment from some other source), imply an obligation "to pay by taxation. The right of a county or township "to contract a debt, must, therefore, be limited by its "right to tax.

"In the case before us, no tax can lawfully be levied "to pay the debt; the contract itself is void for want of "authority to make it. The validity of a contract which "can only be fulfilled by a resort to taxation, depends on "the power to levy a tax for that purpose.

"It is settled, by a vast weight of authority, that the "building of a railroad is for a *public* purpose. Debts "created by counties and other municipalities, in aid of "railroad companies, are held to be valid, on the ground "that the purpose for which the taxes to pay them are "levied, is for a public use, and for a purpose or object "which it is the right and duty of the government to as-"sist by money raised from the people by taxation. Rail-"road corporations have the power to obtain right of way;

" they are subject to the laws which govern common car-
" riers; these roads are established as post-roads; and,
" therefore, they possess these and the like characteristics
" of a *public* nature.

" If Congress authorizes counties in a Territory to con-
" tract debts in aid of a railroad, it must intend to author-
" ize them to levy such taxes as are necessary to pay the
" debts, unless there is in the act itself, or in some general
" statute, a limitation upon the power of taxation, which
" repels such an inference. These general views prepare
" the way for an inquiry into the chief objection urged—
" namely, Has Congress the constitutional power to enact
" such a law as the act of May 27, 1872?

" And first, what are the sources of the power of Con-
" gress to legislate for a Territory of the United States,
" and what is the extent of that power?

" In the case of the *American Insurance Co.* v. *Can-*
" *ter*, 1 Peters, 511, the sources of the power of Congress
" to legislate for a Territory were referred to by Chief
" Justice MARSHALL. He said that 'the Constitution con-
" fers absolutely on the Government of the Union the pow-
" ers of making war and of making treaties; consequently,
" that Government possesses the power of acquiring terri-
" tory either by conquest or treaty.' Again he remarked
" upon that clause of the Constitution which empowers
" Congress to make all needful rules and regulations re-
" specting the territory or other property of the United
" States, and leaving the true source of the power as be-
" tween the two, an open question, he remarked that 'per-
" haps the power of governing a Territory belonging to the
" United States, which has not, by becoming a State, ac-
" quired the means of self-government, may result necessa-
" rily, from the fact that it is not within the jurisdiction of
" any particular State, and is within the power and jurisdic-
" tion of the United States. The right to govern may be
" the inevitable consequence of the right to acquire terri-

" tory. *Whichever may be the source whence the power is* " *derived, the possession of it is unquestioned.*' That is to " say, without specifying or deciding whether the power " arises by necessary implication from the right to acquire " territory, or whether it proceeds from the express words " 'to make all needful rules and regulations respecting the " territory,' the possession of the power is admitted and " cannot be questioned.

" In the case of *Dred Scott* v. *Sandford*, 19 How. 393, " TANEY, C. J., in reference to the case of the *American* " *Insurance Co.* v. *Canter*, said: 'It is thus clear, from the " whole opinion on this point, that the court did not mean " to decide whether the power was derived from the clause " in the Constitution, or was the necessary consequence " of the right to acquire. They do decide that the power " in Congress is unquestionable, *and in this we entirely* " *concur*, and nothing will be found in this opinion to the " contrary. The power stands firmly on the latter alter- " native put by the court—that is, as *the inevitable conse-* " *quence of the right to acquire territory.*'

" Mr. Justice CURTIS, on the contrary, deduced the " power of Congress to govern the Territories, not from " the right to acquire, but from the power expressly " granted to make all needful rules and regulations. He " put it on the ground that as 'this a grant of power to " Congress, that it is therefore necessarily a grant of power " to legislate; and, certainly, rules and regulations re- " specting a particular subject, made by the legislative " power of a country, can be nothing but laws. Nor do " the particular terms employed, in my judgment, tend in " any degree to restrict this legislative power. Power " granted to a Legislature to make all needful rules and " regulations respecting the Territory, *is a power to pass* " *all needful laws respecting it.*' And again: 'The ques- " tion whether a particular rule or regulation be needful, " must be finally determined by Congress itself. Whether

" a law be needful, is a legislative or political, not a judi-
" cial question. Whatever Congress deems needful is so,
" under the grant of power.' And further: 'I cannot
" doubt that this is a power to govern the inhabitants of
" the Territory, by such laws as Congress deems needful,
" until they obtain admission as States. Whether they
" should be thus governed solely by laws enacted by Con-
" gress, or partly by laws enacted by legislative power
" conferred by Congress is one of those questions which
" depends on the judgment of Congress—a question which
" of these is needful.'

" But in the present case, the source of the power of
" Congress is unimportant. In the *Dred Scott* case, the
" majority of the court admitted that under the implied
" authority, Congress has power to organize and govern
" the Territories until they arrive at a suitable condition
" for admission to the Union; they admitted, also, that the
" kind of government which shall thus exist should be
" regulated by the condition and wants of each Territory,
" and that it is necessarily committed to the discretion of
" Congress to enact such laws for that purpose as that dis-
" cretion may dictate. And TANEY, C. J., in his opinion
" —save as to property in slaves—points out no limits to
" that discretion, save only those which are found in the
" Constitution itself. (See article I, section IX; also
" Amendments to the Constitution.)

" Mr. Justice CATRON, in a vigorous review of the
" source of power, held 'that Congress is vested with
" power to govern the Territories of the United States by
" force of the third section of the fourth article of the Con-
" stitution. (*Scott* v. *Sandford*, *supra*; *Cross* v. *Harrison*,
" 16 How. 193.)

" Mr. Justice MCLEAN neld likewise, declaring that
" the power to make all needful rules and regulations is a
" power to legislate, because Congress cannot make 'rules
" and regulations' except by legislation. In referring to

" the criticism of TANEY, C. J., on the opinion of MAR-
" SHALL, C. J., in the case of the *Ins. Co.* v. *Canter*, *supra*,
" Justice MCLEAN said: 'I can see no want of precision
" in the language of the Chief Justice (MARSHALL); his
" meaning cannot be mistaken. He states, first, the third
" section as giving power to Congress to govern the Ter-
" ritories, and two other grounds from which the power
" may also be implied. The objection seems to be, that
" the Chief Justice (MARSHALL) did not say which of
" the grounds stated he considered the source of the power.
" He did not specifically state this, but he did say, '*which-*
" *ever may be* the source whence the power is derived, *the*
" *possession of its unquestioned*. No opinion of the court
" could have been expressed with a stronger emphasis;
" the power in Congress is unquestioned. But those who
" have undertaken to criticise the opinion, consider it with-
" out authority, because the Chief Justice (MARSHALL)
" did not designate specially the power. This is a singular
" objection. If the power be unquestioned, it can be a
" matter of no importance on which ground it is exer-
" cised.'

" And Mr. Justice CAMPBELL, in same case, page 514,
" in illustrating the scope and operation of the third sec-
" tion of the fourth article of the Constitution, states that
" 'this clause in the Constitution does not exhaust the
" powers of Congress within the Territorial subdivisions,
" or over the persons who inhabit them. Congress may
" exercise there all the powers of government which be-
" long to them as the Legislature of the United States, of
" which these Territories make a part. (*Loughborough* v.
" *Blake*, 5 Wheat. 317.) Thus the laws of taxation,' etc.,
" 'are as operative there as within the States.' And again
" he says—'I admit that to make the bonds for the juris-
" diction of the Government of the United States within
" the Territory, and of its power in respect to persons and
" things within the municipal subdivisions it has created,

" is a work of delicacy and difficulty, and, in a great meas-
" ure, is beyond the cognizance of the judiciary depart-
" ment of that Government.'

" Kent, in Vol. 1, page 421 of his Commentaries, de-
" clares that 'with respect to the vast Territories belong-
" ing to the United States, Congress has assumed to exer-
" cise over them supreme powers of sovereignty. Exclu-
" sive and unlimited power of legislation is given to Con-
" gress by the Constitution, and sanctioned by judicial de-
" cisions.' And again, 'the general sovereignty existing
" in the Government of the United States over its Terri-
" tories, is founded on the Constitution, which declared
" that Congress should have power to dispose of and make
" all needful rules and regulations respecting the Terri-
" tories, or other property belonging to the United States.'

" Mr. Abbott, in his work on U. S. Practice, (Vol.
" 1, page 185) says that 'in legislating for the Territories,
" or the District of Columbia, Congress exercises *an ex-*
" *clusive power* of legislation, under the general authority
" given by the Constitution in respect to the Territory be-
" longing to the United States.'

" In Story on the Constitution (Vol. 2, § 1325) it is
" said that 'no one has ever doubted the authority of Con-
" gress to erect Territorial governments within the terri-
" tory of the United States, under the general language of
" the 'clause, to make all needful rules and regulations.'
" And in section 1328 it is further remarked, that 'the
" power of Congress over the public territory is clearly *ex-*
" *clusive* and *universal;* and their legislation is subject to
" no control, but is absolute and unlimited, unless so far
" as it is affected by stipulations in the cessions, or by the
" ordinance of 1787, under which any part of it has been
" settled.'

" If, then, Congress possesses the power of exclusive
" legislation in and over the Territory of Dakota, it must
" follow that Congress also inclusively possesses the power

" of taxing the Territory. The grant to Congress of exclu-
" sive legislation over a Territory, necessarily implies the
" power to impose taxes for the public purposes of the Ter-
" ritory. The power thus to tax needs not to be particularly
" specified or expressed. It is inherent in every sover-
" eignty. No constitutional government can exist without
" it.

" In the case of *Providence Bank* v. *Billings*, 4 Peters,
" 561, MARSHALL, C. J., said: 'The power of legislation,
" *and consequently of taxation*, operates on all persons and
" property belonging to the body politic. This is an origi-
" nal principle which has its foundation in society itself.
" It resides in the government as part of itself, and need
" not be reserved where property of any description, or
" the right to use it in any manner, is granted to individ-
" uals or corporate bodies. However absolute the right of
" any individual may be, it is still in the nature of that
" right that it must bear a portion of the public burdens,
" and that portion must be determined by the Legislature.
" This vital power may be abused; but the interest, wis-
" dom, and justice of the representative body, and its re-
" lations with its constituents, furnish the only security
" against unjust and excessive taxation, as well as against
" unwise taxation.' And again the same judge says, in
" *McCullock* v. *Maryland*, 4 Wheat. 430, it is 'unfit for
" the judicial department to inquire what degree of taxa-
" tion is the legitimate use, and what degree may amount
" to the abuse, of the power.'

" In the case of *Loughborough* v. *Blake*, 5 Wheat.
" 317, a question was made whether Congress had consti-
" tutionally a right to lay a direct tax, according to the
" rule of apportionment on the District of Columbia, under
" the prohibition in subdivision 4, of section IX. of article
" I.,—'no capitation or other direct tax shall be laid, un-
" less in proportion to the census or enumeration herein
" before directed to be taken.'

"After a clear and elaborate argument on the power "of Congress as to this right, the following words are "found in the opinion: 'If the general language of the "Constitution should be confined to the States, still the "sixteenth paragraph of the eighth section gives to Con- "gress the power of exercising exclusive legislation in all "cases whatsoever within this District. On the extent of "these terms, according to the common understanding of "mankind, there can be no difference of opinion.' What "is this but declaring that any grant of exclusive legisla- "tion, carries with it the power to impose taxes? What "is this but saying that, apart from any interpretation by "legal minds, the common sense of mankind so construes "such a grant?

"Exclusive legislation in the District, or in a Territory, "must mean such legislation as is suitable or needful in "the government of such particular portion or locality, "of the whole domain termed the United States, in con- "tradistinction to that other kind of legislation which em- "braces the entire community thereof. In respect to the "latter, 'Congress shall have power to lay and collect "taxes, duties, imposts and excises, to pay the debts and "provide for the common defense and general welfare of "the United States; but all duties, imposts, and excises "shall be uniform throughout the United States,' thus lay- "ing down the rule of uniformity, as well as that of op- "portionment above referred to, concerning direct taxation. "But this power relates to general taxation throughout "the Republic, for purposes appertaining to its general "welfare.

"But whence is derived, and who has the power to "tax the District of Columbia, or the Territory of Dakota, "for its local purposes, and for its local welfare? The "answer is, that the people of the United States ordained "and established a Constitution in which, and by which, "the power of exclusive legislation, and, consequently, the

" power to tax, were granted to Congress over this Terri-
" tory, as well as over the District, for all local objects and
" purposes.

" The people of the United States permitted their rep-
" resentatives to tax a part of the society, organized under
" the Constitution, which is in a state of infancy advanc-
" ing to manhood, and looking forward to complete equal-
" ity as soon as that state of manhood shall be attained—
" as well as for municipal or Territorial purposes, as for
" strictly natural objects.

" The history of the legislation of Congress over the
" District of Columbia, abundantly exhibits and proves
" this marked division of the taxing power. In the one
" case, for national purposes, under the general power
" contained in section eight, article 1, Congress has laid
" the taxes in proportion to the census; and duties, im-
" posts and excises, under the rule of uniformity. In the
" other case, for strictly Territorial or municipal purposes,
" apart altogether from national objects, Congress imposed
" taxation on the particular subdivision, by virtue of its
" power of exclusive legislation, thereby exercising a
" power parallel to that of a State Government. And this
" may serve to show the meaning of MARSHALL, C. J., in
" the case in 1 Peters, above quoted, in which that emi-
" nent judge said that 'in legislating for them' (the Terri-
" tories) 'Congress exercises the combined powers of the
" General and of a State Government.'

" Congress asserted its undisputed sovereign power,
" when, in the legislative grant contained in the organic
" act of this Territory, it put certain restrictions or limi-
" tations upon the power of the Legislative Assembly in
" reference to the subject of taxation. And so likewise in
" regard to the District of Columbia. A Territory is, as
" it were, a vast municipal or public corporation, created
" by Congress, and deriving all its powers from the source
" of its creation. It is a great body politic and corporate,
" invested with subordinate legislative powers, to facili-

" tate the due and proper administration of its own internal " affairs, and to promote the general welfare of the munici- " pality. Of itself it has no inherent jurisdiction to make " laws, or to adopt governmental regulations; nor can it " exercise any other powers in that regard than such as " are expressly or impliedly derived from its charter or or- " ganic act, or other act of Congress. And as with a mere " ordinary municipal corporation in a State, so with a Ter- " ritory, it is settled law, that the Legislature in granting " the specific authority does not divest itself of any power " over the inhabitants of the District which it possessed " before the charter was granted, or the organic act was " passed. Unless the Constitution otherwise provides, the " Legislature still has authority to amend the charter of " such a corporation, to enlarge or diminish its powers, " extend or limit its boundaries, divide the same into two " or more, and to overrule its action whenever it is deemed " unwise, impolitic, or unjust. (Cooley on Const., 2d Ed. " 192.) The charters of such public corporations may be " changed, modified, or repealed, as the public welfare " may demand. (2 Kent Com. 305; 1 Greenl. Ev. 12th " Ed., § 331; *Russell* v. *Reed*, 27 Penn. St. 170.)

" This conclusion is reached, that as Congress has the " power of exclusive legislation over this Territory, within " which is necessarily included the right of taxation, there- " fore the act of Congress of May 27, 1872, entitled 'An " act in relation to the Dakota Southern Railroad Com- " pany,' is valid and constitutional.

" The next consideration is as to the scope and effect " of this act of Congress. It begins by terming the body " of men who passed the Territorial enactment of April 21, " 1871, as 'the Legislative Assembly of the Territory of " Dakota.' As Congress was about to legislate on this " Territorial act, they knew its origin and history, and had, " of course, the whole body of it before them; and all its " features, bearings and results were duly scanned and " considered. Its title was 'An act to enable organized

" counties and townships to vote aid to *any railroad*, and " to provide for the payment of the same.' It was, as has " been remarked, a general act, applicable to all counties " in the Territory, and to any railroad. In this shape, at " least, Congress was averse to it; and it was accordingly " disapproved and annulled, except in so far as Congress, " in its wisdom, otherwise provided. The Territorial en- " actment thus became narrowed down to such transac- " tions as had occurred, or might occur, between the vot- " ers of the counties of Union, Clay, Yankton and Bon " Homme, and one railroad company, to wit: the Dakota " Southern. Contracts and engagements before that time " made and entered into between the parties specified, or " that might thereafter be made, were sanctioned, ap- " proved and authorized. Any vote that had been given " by the county of Yankton, granting aid to the said rail- " road, or any subscription thereto, or anything author- " ized by, and that had been done in pursuance of the pro- " visions of the Territorial act, toward the construction and " completion of this particular railroad, was saved and re- " served out of the general disapproval, and declared valid. " And all the provisions of the Territorial act, so far as they " authorize any vote of aid and subscriptions to the said " railroad company, were declared to be and remain in " full force. The purpose is clearly expressed by Congress, " *i. e.*, to validate past transactions done in pursuance of " the Territorial enactment, between the said railroad and " the specified voters.

" The act of the Legislative Assembly, thus denuded " of its public or general character, became, by the ratifi- " cation of Congress, a private statute concerning only a " particular railroad company and a few municipalities. " And the Supreme Court of the United States has re- " peatedly recognized the validity of private curative stat- " utes, and given them full effect, where the interests of " private individuals were alone concerned, and were " largely involved and affected. In *Satterlee* v. *Matthew-*

" *son*, 2 Peters, 380, it was asserted that retrospective laws, " which do not impair the obligation of contracts, or par- " take of the character of *ex post facto* laws, are not con- " demned or forbidden by any part of the Constitution.

" In *Wilkinson* v. *Leland*, 2 Peters, 627, it was ad- " mitted that the act was retrospective, and yet gave va- " lidity to a void transaction. (See, also, *Watson* v. *Mercer*, " 8 Peters, 88; *Leland* v. *Wilkinson*, 10 Ibid. 294; " *Charles River Bridge* v. *Warren Bridge*, 11 Ibid. 420; " *Stanley* v. *Colt*, 5 Wall. 119; *Croxall* v. *Shererd*, Ibid. " 268.)

" Cooley on Const. Limitations (page 374) says, that " legislative acts validating invalid contracts have been " sustained; and that when these acts go no further than " to bind a party by a contract which he has attempted to " enter into, but which was invalid by reason of personal " disability on his part to make it, or through neglect of " some legal formality, or in consequence of some ingre- " dient in the contract forbidden by law, they cannot well " be obnoxious to constitutional objection. The same au- " thor, under the head of 'Retrospective Laws,' in refer- " ring to contracts by munincipal corporations, which, " when made, were in excess of their authority, but sub- " sequently have been confirmed by legislative action, " states that 'if the contract was one which the Legislature " might *originally* have authorized, the case falls within the " rule we have laid down, and the legislative action is to " be sustained. Some of the cases where municipal sub- " scriptions in aid of railroads were held valid, were cases " where the original undertaking was without authority of " law, and was confirmed by retrospective act of legisla- " tion.' (Referring, *inter alia*, to *Thompson* v. *Lee County*, " 3 Wall. 327.)

" But still more important is the case of *Beloit* v. " *Morgan*, 7 Wallace, 619, in which it was held 'that in " cases of bonds issued by municipal corporations, under a " statute upon the subject, *ratification* by the Legislature

" is in all respects equivalent to *original authority*, and " *cures all defects of power*, if such defects existed, and all " irregularities in its execution.' (See, also, *Bissell* v. *City* " *of Jeffersonville*, 24 How. 295; *Ritchie* v. *Franklin* " *County*, 22 Wall. 68.)

" The contract betwen the county of Yankton and the " railroad company in question, was one which Congress " might originally have authorized, and therefore the Con- " gressional action of May, 1871, ratifying the same, must " be sustained. By the fifth section of the ratified act, it " became the duty of and it was obligatory on the Board " of County Commissioners to issue and deliver bonds to " the railroad company, if a majority of the electors vot- " ing at an election held in pursuance of the local act, had " so decided; and to issue them in conformity to the " amount specified by a majority of the ballots, and to the " terms of payment, to the interest, extent of time, etc., " thus voluntarily agreed upon. And in the view I have " taken of this case there is no substantial difference be- " tween a vote of donation to aid a railroad, and a sub- " scription to its capital stock.

" But there is another point in the case which should " receive consideration. The complaint shows that the " bonds have been issued and delivered to the railroad " company, with coupons attached representing the inter- " est. It shows they were executed, issued and delivered " in 1872 and 1873. And yet the railroad company has " not been made a party defendant to this suit. The com- " pany is, so far as it appears, directly interested in the re- " sult; or, as is shown, the company has rights which must " necessarily be affected by the judgment of this court. " The opinion of the majority of the court ignores all claims " of the company, and even of innocent holders. The ab- " sence of such party may be objected to, and taken at " any time upon the hearing, or in the Appellate Court. " Our local statute provides that 'the court may deter-

"mine any controversy between the parties before it,
"when it can be done without prejudice to the rights of
"others, or by saving their rights; but when a complete
"determination of the controversy cannot be had without
"the presence of other parties, the *court* must cause them
"to be brought in.'

"Here is a case in which this court undertakes to de-
"cide upon the rights of a party acknowledged to possess
"bonds in question to the amount of two hundred thou-
"sand dollars, in the absence of such party, and without
"any allegation that he is beyond our jurisdiction.

"What rights and equities the railroad company may
"have, apart from the present display of the case, we
"know not; but surely before deciding, a party like this
"should be heard, or his absence regularly accounted for.
"(1 Peters, 299; 17 How. 130; 19 How. 113.)

"From the issuing of these bonds in 1872, until the
"bringing of this action in 1875, the County Commission-
"ers have annually levied a tax, designated as the railroad
"tax, for the purpose of paying the interest—and in none
"of these years has the levy exceeded two per cent. of the
"assessed valuation of the property. This has been done
"in pursuance of the sixth section of the ratified act of the
"Assembly. It would seem, therefore, that there has been
"acquiescence until this suit, which is one brought by a
"single tax-payer.

"The plaintiff asks that the railroad tax levied on his
"property to pay the interest, may be declared illegal and
"void, and that the county and its agents may be perpet-
"ually enjoined from the proceeding to collect such tax.
"The defendants, namely, the county itself and its treas-
"urer, demurred to the complaint, for that the complaint
"does not state facts sufficient to constitute a cause of ac-
"tion. In other words, the county resists, by its plead-
"ing, the prayer of the plaintiff, and thereby, on its record,
"impliedly admits that the tax is lawful and valid, and
"consequently opposes the granting of the injunction.

"I fully concur with the county and its financial agent "in the view thus presented by their demurrer, and I hold, "in accordance therewith, that the complaint does not "state facts sufficient to give plaintiff a cause of action.

"The judgment of the District Court, which sustained "the defendants' demurrer, and dismissed the complaint, "should, in my opinion, be *affirmed*."

APR 16 1880

Supreme Court of the United States.

No. 269.

THE FIRST NATIONAL BANK OF BRUNSWICK, MAINE, Appellant,

vs.

THE COUNTY OF YANKTON, Appellee.

The only question in this case which I wish to present to the court is in relation to the effect of the so-called ratifying act of Congress.

This act is found in the record at pages 10 and 11.

It is not seriously contended that the pretended act of the Legislature was of any validity in itself. The Territorial Legislature had previously been in session forty days, which is by law the limit of its session. No provision of law authorized the Governor of the Territory to call an extra session.

Now, the question is whether the act of Congress shows that Congress intended to give validity to what was then utterly void, or merely intended that the act disapproving of the Territorial act should render valid what would have been utterly nugatory but for the act of Congress. We contend for the latter construction. And if we are right in this, the judgment of the court below must be affirmed, because the judgment was right without regard to the reasons assigned for it.

Matt H. Carpenter,
Of Counsel for Appellee.